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Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE POWELL, *et al.*,

Petitioners,

v.

CAREY INTERNATIONAL, INC.,
a Delaware corporation, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Should this Court resolve the split in the circuits (the Sixth and Seventh Circuits v. the Fifth and Eleventh Circuits) that exists concerning whether an award of attorneys' fees should be reduced if the plaintiff does not recover the entire amount of damages he sought in his calculation of damages or that he sought in pre-suit negotiations in a Fair Labor Standards Act case?

In this case, the damages calculations were not an issue until one and one-half years into the litigation, and when the Defendants raised that issue, damages for overtime were calculated on a weekly basis, and there was no issue in the case concerning damages calculations. The district court made an express finding that the Defendants were to blame for the significant expenditure of attorneys' fees in this case. The Defendants filed a motion to dismiss arguing all the Plaintiffs were exempt, and stayed discovery as to all other issues, and Defendants' motion was denied one year into the litigation. After that, discovery was opened up to all issues, including damages. Plaintiffs received summary judgment in their favor as to the exemptions a year later, and the case was going to go to trial as to just damages. The twelve Plaintiffs received approximately $300,000 in overtime pursuant to an offer of judgment on the eve of trial that allowed for attorneys' fees. The Defendants

QUESTIONS PRESENTED – Continued

took the position that they were not going to settle until summary judgment was decided. Some of the Plaintiffs received more money than they were offered pretrial, none received less, because the Defendants required that no Plaintiff could settle unless all the Plaintiffs settled and Plaintiff Powell agreed to quit his job, but the district court reduced the attorneys' fees from $480,000 sought to $80,000, awarding a paralegal hourly rate to one partner who performed most of the work in the case ($175.00, though he has published attorneys' fee decisions awarding him $300.00 per hour), although the district court admitted in a consolidated retaliation case that that partner had "impressive credentials" as a lawyer, and not awarding the other two partners any fees, even though one was ordered to appear at hearings and perform certain work in the case.

II.

Should the Court resolve the dispute that has arisen in the circuits as to whether contract principles should govern offers of judgment, when in this case, the Defendants served offers of judgment that stated that the Plaintiffs were entitled to their reasonable attorneys' fees, were silent as to the fact that the Defendants intended to seek hundreds of thousands of dollars in sanctions, so that the Plaintiffs accepted the offers of judgment, believing that attorneys' fees and costs were to be awarded, only to find

QUESTIONS PRESENTED – Continued

out later that the Defendants were taking the position the Plaintiffs were not prevailing parties, should not receive any attorneys' fees at all, and that sanctions should serve to reduce the attorneys' fees completely, or have the Defendants awarded thousands of dollars?

LIST OF PARTIES

George Powell, Viliam Kralovic, Errol Robinson, Carlos Betancourt, Alphonso McIntyre, Oscar Perez, Francisco Rengifo, Miomir Maksimcev, Juan Alba, Luis Loizaro, Wilhelm Pereira, John Humphreys, Anousheh Sarfaraz, Mark Donahay, Eduardo Mazzeo, Petitioners.

Carey International, Inc., Carey Limousine Florida, Inc. and Vince Wolfington, Respondents.

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals affirming the Southern District Court of Florida's Order Granting in Part Plaintiffs' Motion for Attorneys' Fees is unpublished. It is included in the appendix at App. 1. The district court's Order Granting in Part Plaintiffs' Motion for Attorneys' Fees is published at 547 F.Supp.2d 1281. It is included in the appendix at App. 4. The Eleventh Circuit's denial of rehearing is also unpublished, and included in the appendix at App. 30.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on April 21, 2009. App. 1. Rehearing was denied on June 15, 2009. App. 30. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act, 29 U.S.C. § 216(b).

(b) Damages, right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid

overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or

section 207 of this title by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Rule 68

Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer.

More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

STATEMENT OF THE CASE

On September 2001, Olga Gutescu filed her first lawsuit against Defendants, for discrimination and overtime. *Gutescu v. Carey Int'l, Inc., et al.*, Case No. 01-4026-CIV-MARTINEZ. It turned into a class action, and settled on February 24, 2004, the business day before trial was supposed to begin. Defendants' only defense to the overtime claim was that the drivers were independent contractors. Overwhelming evidence in that case showed that the drivers were

employees and not independent contractors (they signed applications for employment, I-9 forms, took drug tests, etc.). (R241-3-12). The *Gutescu* case was heavily litigated, as there were approximately 500 docket entries. (R241-3-6).

In September 2003, another group of drivers (who could not join the *Gutescu* action) brought suit against Defendants. *Rodriguez, et al., v. Carey Int'l, Inc.*, Case No. 03-22442-CIV-UNGARO. *Rodriguez*, which involved numerous drivers, was settled on the business day before trial was supposed to begin, January 5, 2005. (R1-1-2). In *Rodriguez*, Defendants raised the independent contractor defense, and half way through the litigation added the motor carrier exemption affirmative defense. Defendants were not successful with either defense. However, they did obtain a ruling that plaintiffs were only entitled to half-time damages and not time and one-half pay on the ground that the drivers were paid by the job as set forth in 29 C.F.R. § 778.112, which states that if an employer pays a flat sum for performing a particular job and provides no other form of compensation only an additional half-time need be paid. This ruling was obtained despite the fact that the drivers are paid a percentage of the charge to the customer, a fixed gratuity, a fuel surcharge, and sometimes were paid hourly for waiting time. (R274). The issue was decided early in *Rodriguez*, before the plaintiffs were able to engage in discovery. Like *Gutescu*, the *Rodriguez* case involved approximately 500 docket entries, and the related litigation involved

approximately 2,000 docket entries. (R1-1-2). The Defendants are owned by a New York private equity firm – Chartwell Investments, Inc.

In the summer of 2004, Plaintiffs' counsel sought to have George Powell, Viliam Kralovic, Errol Robinson, and Carlos Betancourt (Plaintiffs in this case) come to a mediation of the consolidated *Rodriguez* cases, and he wrote a letter to defense counsel several days in advance requesting that they be allowed to attend, and those men actually came to the Federal courthouse in Miami for a mediation before Magistrate Judge Peter Palermo, but, before the mediation began, Defendants took the position that they would not mediate with these men, and Judge Palermo had no choice but to inform them that they could not attend the mediation. (R527-11) (asking defense counsel to allow the class members who have filed notices of consent to mediate their claims at the May 19, and 20, 2004 settlement conference, and citing to an Emergency Motion to Compel the attendance of Betancourt, Powell, Kralovic, and Robinson at the settlement conference in May, 2004, and stating that "[t]he fact that opposing counsel, Ms. Thompson, is against this speaks volumes. She obviously does not want this litigation to end"). The men went home. (R527-11). Had the Defendants really been interested in settling these cases, they would have settled with these men at that time, and this case (*Powell*) would never have been filed. (R527-11). Further, in *Rodriguez*, there were subsequent mediations before Judge Palermo (Dec. 14, 2004) and Judge Wetherington

(Jan. 3, 2005), during which the case settled. (R527-11). In neither one was Powell, Betancourt, Kralovic, or Robinson allowed to attend. (R527-11).

Before suit was brought in *Powell*, because of the past history with the *Gutescu* and *Rodriguez* litigation, Plaintiffs' counsel, a small law firm in Plantation, Florida, initiated pre-suit settlement negotiations to hopefully prevent the type of litigation that occurred previously, particularly since the parties had an understanding as to the lack of applicability of the previously-asserted defenses. Unfortunately, the case was not resolved pre-suit. Although the Order on Fees in this case specifically states that Plaintiffs refused to calculate their damages using the half-time measure as Judge Ungaro ruled (R543-9) (stating that "notwithstanding the fact that this legal issue [the applicability of § 778.112] had been previously determined under identical circumstances, Plaintiffs did not implement this method when estimating damages during both the settlement negotiations prior to suit and throughout the litigation"), Plaintiffs' counsel calculated the Plaintiffs' damages using both a half-time calculation and a time and one-half calculation. (R520-4 & Ex.1). Defendants, who possessed the pay records, which are necessary to arrive at more detailed weekly damages calculations, offered no rebuttal calculation, but merely provided offers and counteroffers to Plaintiffs' various demands, claiming that their records (that they did not provide to Plaintiffs) demonstrated that Plaintiffs were only owed very small amounts of money

(smaller, in some cases, than the offers of judgment Defendants later provided and smaller than Defendants' own expert witness's calculations). (R520-5 & Ex.2).

For example, on April 18, 2005, ten (10) weeks into the negotiation, Defendants stated that the pay documents of the individuals showed that when Plaintiffs' damages were calculated on a weekly basis, they were only owed as follows: Betancourt – $700.82; Powell – $7,647.04; Robinson – $245.00; Kralovic – $40.00, and Zarceno and McIntyre – $0.00. (R520-5 & n.2 & Ex.2). All of the Plaintiffs accepted Offers of Judgment served by the Defendants on April 20, 2007, that provided for more money than what Defendants claimed Plaintiffs were owed in the April 18, 2005 letter. (R427;R435;R444;R451;R452;R454). Further, Defendants' own expert calculated the damages of these drivers to be more than what Defendants represented in this letter. On September 21, 2007, Defendants' expert calculated that the back pay overtime (not including liquidated damages which would work to double these amounts) for Kralovic was $539.69, Powell was $10,791.84, Robinson $254.04, and McIntyre $17,716.20. (R520-5 & n.2 & Ex.5). Additionally, Defendants' expert's report lists the damages to Betancourt as being $700.82 and Sarfaraz as being $6,957.77, when these amounts are liquidated, they are well more than the amounts of damages that the Defendants claimed were owed these drivers in the April 18, 2005 letter. (R520-5 & n.2 & Ex.5).

At one point in the pre-litigation settlement efforts, while offering the rest of the Plaintiffs some money, Defendants offered Mr. McIntyre and Mr. Zarceno $0.00, and required that all Plaintiffs settle or no Plaintiff settles, and Powell had to terminate his employment. (R520-5 & Ex.2 at p.2). Two Plaintiffs desired to settle, Betancourt and McIntyre, and Defendants were informed of that fact (R520-5 & Ex.3), but Defendants informed that they would not settle with only those two drivers, if all of the other drivers did not settle. (R520-5-6 & Ex.4). On May 13, 2005, Defendants' counsel revised their settlement offers to the drivers (R520-5-6 & Ex.8). It is interesting that the offer to McIntyre went from $0.00 to $32,650 in less than a month. (R520-5 & Ex.8). The credibility and reliability of any of the time records of Defendants could not be placed more into doubt than the meteoric rise in McIntyre's offer in less than one month. If McIntyre did not accept his offer of $0.00 based on the first offer, then the offers to all the other drivers were null and void. The fact that he was offered $32,650 less than one month later shows the first settlement offer was designed so that no driver could settle their claim. (R520-5-6 & n.3 & Ex.8).

Defendants argued that "several of [the Plaintiffs] eventually settled for less money (when they accepted their offers of judgment at the end of the case in April, 2007) than Defendants offered at the beginning of the case" (R503-3), and the Court's Order on fees found this as well (R543-8-9), but this disregards the record evidence that two of those

individuals, Betancourt and McIntyre, wanted to settle, but Defendants would not settle with them alone. (R520-6 & n.4). Kralovic and Robinson wound up with *more* than the Defendants were offering (R435;R454), and Powell would have to have given up his job to settle (R520-6-Ex.2 at p.2), and he wound up working with the Defendants for another year. Once the *Perez* case, *infra* p.16, was settled (where Powell's retaliation claim was eventually transferred), Powell wound up with *more* money than Defendants offered initially and both the district court and Defendants know that. In any event, it is clear that Powell's retaliation claim was taken into account by the Defendants in the April 18, 2005 letter, because they state that Powell's overtime claim is only $7,647.04, but they offered him $18,000. (R527-14). *From the date the pre-suit settlement discussions began (Feb. 4, 2005) until the date that the Defendants served their First Offers of Judgment (late Feb. 2007), no drivers had the opportunity to settle their respective claim with the Defendants, unless all of the other drivers agreed to settle their claims on the terms dictated by the Defendants.* (R520-6 & n.4 & Ex.10); (R527-12 & Ex.21).

Counsel for the drivers responded to the second and last pre-litigation offer of settlement, on May 17, 2005, indicating that two drivers would accept their offers and suggested that Defendants pay a pro-rated share of the legal fees offered in Defendants' second offer, in order to resolve these two claims. (R520-6 & n.4 & Ex.9). On May 25, 2005, defense counsel replied

that Defendants were not interested in settling just a few drivers' claims referring to that as a "piecemeal settlement", insisting that the drivers' claims had to be settled on a "global basis". (R520-6 & n.4 & Ex.10). To argue that any driver did worse in accepting an offer of judgment than the offers that were previously offered in the case is misplaced, when no driver was ever offered the opportunity to settle on an individual basis. (R520-6 & n.4 & Ex.10). When such an effort was made, it was rejected by defense counsel as being a "piecemeal settlement" that Defendants were not interested in. (R520-6 & n.4 & Ex.10).

Defendants then abruptly stopped all negotiations and withdrew all previous settlement offers. (R527-12 & Ex.21). It thus became clear that the case (or any individual Plaintiff's claim) could not be resolved pre-suit; thus, on May 24, 2005, George Powell and Viliam Kralovic filed a Complaint in the United States District Court for the Southern District of Florida, bringing causes of action for overtime and minimum wage violations, against Defendants Carey International, Inc. (the world's largest limousine company) and Vince Wolfington (their former CEO). (R1). The wage and hour claims were brought pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (R1). Contemporaneously with the filing of the Complaint, a Motion to Permit Court Supervised Notice to Employees of Their Opt-in Rights was filed. (R4). In addition to Powell and Kralovic, several other drivers filed Notices of Consent to Join,

Anousheh Sarfaraz, Mark Donahay, Errol Robinson, Carlos Betancourt, and Alphonso McIntyre. (R5).

On July 5, 2005, Defendants filed a Motion to Dismiss on the ground that the drivers were exempt from wage and hour remedies because of the 1) motor carrier exemption (which the parties previously litigated in *Rodriguez*) and 2) the taxicab exemption. (R19;R20). Contemporaneously with the filing of the Motion to Dismiss, Defendants filed a Motion for Limitation and Stay of Certain Discovery until the Court issued a definitive ruling on their two exemptions. (R18).

On July 22, 2005, Plaintiffs filed an Amended Complaint, because undersigned counsel had neglected to include Powell's retaliation claim in the original Complaint (Powell had been subjected to being assigned far less work and far less desirable work after he attempted to join the *Rodriguez* related litigation on February 24, 2004). (R34). Defendants re-filed their Motion to Dismiss, this time addressing the First Amended Complaint. (R41).

The parties eventually submitted a Joint Scheduling Report, in which the parties expressed their different views regarding how discovery should be conducted in the case. (R48). Plaintiffs noted in the Report that "The Plaintiffs request that the Court refer this case to former Chief Judge Gerald T. Wetherington [who settled the *Rodriguez*-related litigation] for immediate mediation. Plaintiff's counsel strongly desires not to have a repeat of the past

litigation [*Rodriguez* and the related cases] that recently settled, which was before Judge Ungaro-Benages, that had over 2,000 docket entries. The only person who benefits from such litigation is defense counsel." (R48). In fact, Defendants would not go to an early mediation, although they were asked on numerous occasions to mediate the case early. (R520-5-6 & Ex.6). The Joint Scheduling Report contained Plaintiffs' damages calculations (R48-21-23), and on page 24, Defendants took the position that the half-time regulation applies. The Court issued an Order the day before the Scheduling Conference which asked the parties to be prepared to discuss, *inter alia*, "Judge Ungaro's Order on the motor carrier exemption", and whether "the Court [should] determine the appropriate method for calculating damages at an early stage of the proceeding." (R58). The next day (October 6, 2005), the scheduling conference occurred, and how damages were calculated was not going to be decided "at an early stage of the proceedings"; the Court did, however, comment on Defendants' defenses (taxicab and motor carrier exemptions), and forewarned about the resulting attorneys' fees Defendants' litigation tactics and legal positions were creating, as follows:

> [After questioning the Defendants' assertions of the two exemptions, noting that they are inherently inconsistent, and calling the assertion of the motor carrier exemption as "disingenuous", and stating] [t]he bottom line is that I do not find that the motor carrier exemption applies . . . I will share with

> you, given all of the litigation in this case, I am wondering why the Defendant continues to – this is just – I am a new person coming into this case and in looking at it it just seems that the Defendants by insisting on the structure that it is in creates a lot of problems for itself. But obviously it doesn't mind paying attorneys fees. That is its choice. But it is going to continue to have problems for itself. I presume it has made that strategic decision.

(R520-Ex.8 at pp.18-19). Meanwhile, other drivers continued to join the lawsuit by filing Notices of Consent in October, 2005. (R59;R60;R62).

The Court converted the Motion to Dismiss into one for summary judgment, and gave Plaintiffs limited time to engage in discovery. (R75). Despite the fact that the Court stated at the Scheduling Conference that "[t]he bottom line is that I do not find that the motor carrier exemption applies" (R520-Ex.8 at pp.18-19), Defendants continued to maintain that defense, which required Plaintiffs to engage in discovery concerning it, and to eventually file a response to Defendants' Motion to Dismiss Converted into a Motion for Summary Judgment. (R85;R86). Meanwhile, other drivers continued to join the suit. (R92;R93;R106;R123;R130;R131;R132;R133;R134;R135; R138). While the Court's Order converting the Motion to Dismiss into one for Summary Judgment made clear that discovery was limited to the exemptions, the Court eventually specifically granted the

Defendants' Motion for Limitation and Stay of Certain Discovery. (R111).

On March 17, 2006, about a year into the litigation, the Court finally ruled on Defendants' converted Motion for Summary Judgment, and denied it as to both the motor carrier exemption and the taxicab exemption. (R136). A normal discovery schedule (and a discovery period allowing for discovery on all outstanding issues) could now take place. Thereafter, the Court denied Plaintiff's Motion to Permit Court Supervised Notice to Employees of Their Opt-in Rights. (R139). As other drivers decided to join the suit, the Complaint was amended a third and fourth time (since there was no collective action), to add them as parties. (R155;R167). Thereafter, Defendants filed a Motion to Sever the claims of certain Plaintiffs who had signed arbitration agreements, and to compel those claims to arbitration. (R168). Defendants answered the Fourth Amended Complaint, but also brought a counterclaim against those drivers who were still working for it, which asked the Court to allow them to stop assigning those drivers any more work. (R172). The Plaintiffs filed a Motion to Dismiss the Counterclaims. (R177). Defendants' counterclaims were thereafter dismissed. (R245).

Defendants would not go to an early mediation, although they were asked repeatedly. (R527-13-Ex.6). On March 20, 2006, Plaintiffs' counsel, upon receiving this Court's Order Denying Defendants' Motion for Summary Judgment, suggested to defense counsel the parties immediately mediate. (R527-13-Ex.12)

(stating "I am asking that you *reconsider* your position, and agree to mediation immediately so that an effort can be made to amicably resolve this litigation"). Defense counsel's position before that was that Defendants were not going to negotiate until there was a court ruling on liability; Defendants were so sure their Motion for Summary Judgment would succeed that all settlement negotiations were placed on hold. (R527-13).[1]

The overtime calculations *first* became an issue in *August 23, 2006*. (R58-6,22-23,26,29-30,32,33) (noting at page 30 this is the first time the issue has been raised); (R189). Plaintiffs could only use the 1099 forms to annualize the overtime pay rather than calculate it weekly, because that is all that they had. (R586-6-8). Defendants admitted that their trip records do not accurately reflect the time Plaintiffs worked. (R586-19,28,35-37). The court ruled Defendants had to give Plaintiffs their weekly pay records weekly. (R586-50-70). *Defendants did, and this was never an issue after that in the litigation.* The Defendants had already drafted Excel spreadsheet summaries of all of the weekly pay that the Plaintiffs were given by the Defendants (in order to calculate

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[1] Further, it was Defendants' counsel that had needlessly prolonged the litigation in this case by requesting and obtaining a stay on discovery relating to the damages issues in the case. [D.E. 18, 36, 111]. This misdirection forced the parties to focus on the liability issues, which was a waste of resources, and which prevented work on the damages issues of the case for about a year.

damages weekly), and during the discovery hearing Defendants, who did not desire to provide that information but rather wanted to force the Plaintiffs to do it, were ordered by the Court to share their spreadsheet information with Plaintiffs by a certain date, and then Plaintiffs were allotted time to provide the completed calculations to the Defendants. (R189). Defendants had moved to strike certain damages that were alleged in the pleadings, but the Court denied that Motion. (R205).

The calculation of damages was admittedly difficult, as defense counsel admitted; at a discovery hearing on August 23, 2006 defense counsel stated "[w]here we fundamentally disagree is how you use those components to calculate the hourly rate [and thus calculate damages]. I am not here today to try to resolve that issue. It is a very complicated issue, and I imagine we will be briefing it later on in the case before the court." (R586-6). The issue of liquidated damages and willfulness were significant issues (several Plaintiffs could recover nothing if willfulness was not proven – Betancourt, Robinson, Donahay, and Kralovic); they were still in the case, and would have to be tried.

Because Defendants were retaliating against the drivers who were still working for Defendants who had joined the suit, those drivers filed a separate retaliation case in the summer of 2006 (*Perez v. Carey Int'l, Inc.*, Case No. 06-22225-CIV-MARTINEZ), and that case was transferred to Judge Seitz by Defendants. (R215). On November 15, 2006, the Court

granted the Defendants' Motion to Sever and Compel Arbitration, compelling several plaintiffs to arbitration. (R240). That Arbitration has not occurred, but is set for November, 2009.

In November, 2006, the summary judgment stage was bifurcated in that the first round of summary judgment motions pertained to all issues not related to damages, and the second round pertained to only damages calculations and what time (types of tasks) were compensable. Plaintiffs filed a Motion for Summary Judgment on several issues, including the motor carrier exemption and the taxicab exemption, certain contractual defenses that Defendants asserted in their Answer, and concerning liquidated damages and willfulness (R241), while Defendants did not file one on any substantive affirmative defense. Thereafter, both parties filed motions for summary judgment arguing whether the calculation of damages should be half-time (the Defendants) or time and one-half (the Plaintiffs), and whether certain tasks were compensable, like washing the car, waiting between jobs, putting gas in the car, etc. (R272;R274). On February 1, 2007, the Court ruled on the summary judgment motions concerning damages, granting in part both motions and denying in part both motions. (R321). The Court did apply the half-time calculation (rather than time and one-half), but the rest of the motions concerning what tasks constituted compensable time were a "mixed-bag" ruling. (R321). Thereafter, the Joint Pretrial Stipulation was filed in the case, but Defendants did not

include their "contractual" affirmative defenses that were included in their Answer. (R338).

On February 28, 2008, the Court ruled on the Plaintiffs' Motion for Summary Judgment concerning various defenses of the Defendants, and the Court granted summary judgment as to the motor carrier and taxicab exemptions in Plaintiffs' favor. (R371). Thus, there was now no defense to liability in this case. This case was never just all about the money; the Defendants in particular wanted rulings in their favor to serve as precedent, and shortly after summary judgment was granted in Plaintiffs' favor, Defendants settled their other litigation that they had across the country. *See Alcala, et al. v. Carey Int'l, Inc., et al.*, Case No. A07CA087 SS (W.D. Tex. 2007); *Benny Brown, et al. v. Carey Int'l, Inc., et al.*, Case No. CGC-04-437287 (San Fran. Cal.). (R520-4). Defendants filed a Motion for Reconsideration concerning the summary judgment ruling as to the motor carrier exemption, which the Court denied. (R408).

The district court denied summary judgment as to willfulness and liquidated damages, despite the previous lawsuits, and evidence that the Plaintiffs really were employees. (R371). Defendants were taking the position in this suit that liquidated damages and willfulness findings are not warranted because the Defendants reasonably believed that the Plaintiffs were independent contractors. Defendants were taking the position that neither willfulness nor liquidated damages applied because they claimed they reasonably thought that Plaintiffs were

independent contractors, but Mr. Gary Kessler (Defendants corporate counsel and Director of Business Development and later CEO who was managing the litigation) testified that he knew Plaintiffs really were employees:

> Q: Do you know if the Miami chauffeurs were employees or independent contractors?
>
> A: I believe they are employees.

(R520-9 & Ex.9 at pp.218-19 in *Gutescu*, Ex.9). In *Rodriguez*, he was asked a similar question, and again made clear that the Plaintiffs are not independent contractors, as follows:

> Q: Well, is it your opinion that the chauffeurs that work in South Florida are independent contractors or employees?
>
> [objections]
>
> Q: So you believe they are independent contractors?
>
> A: Oh, no.

(R520-9 & Ex.10 at p.68 in *Rodriguez*). Plaintiffs' counsel believed that evidence such as this and the other evidence concerning all of the admissions (orally in depositions and in their own documents) that Plaintiffs were employees was enough to warrant summary judgment, but the Court held otherwise.

Plaintiffs were required by the Court to provide their Rule 1006 summaries to the Defendants by mid-April, and after they did, the Defendants moved to strike them. (R413). According to the offers of judgment, no attorneys' fees were to be awarded after April 20, 2007, and thus these summaries are irrelevant to the fee issue. (R427). Defendants did not keep records of the time that the drivers spent working, and thus the drivers had to estimate their hours. (R586-19,28,35-37); (*See* R298-7;R250-255,81-85,31-42).

The Court then referred certain evidentiary matters to a Special Master, Robert E, Weisberg, such as various deposition testimony that the parties designated and certain objections to it. (R421). In the court's order on the April 19, 2007 pretrial conference, the court stated:

> After reviewing the parties' revised witness and exhibit lists and the lengthy deposition designations and the few days remaining before trial, the Court inquired if the parties would be amenable to the appointment of a special master to aid in finalizing trial preparation. Both parties agreed that a special master would be helpful and specifically agreed to the appointment of Robert Weisberg, Esq. as the special master. Mr. Weisberg's appointment as special master is set out in separate order.

(R422). In its Order Referring Evidentiary Matters to Special Master dated April 19, 2007, the court in

discussing the responsibilities of the special master, stated that:

> [H]e is charged with ordering the parties in resolving evidentiary disputes related to their witness and exhibit lists, including but not limited to, resolving objections to deposition designations, determining the reliability of summary exhibits, eliminating irrelevant cumulative evidence and resolving any other issues or disputes relating to the parties witness and exhibit lists.

(R421). Despite these statements, the court stated in its fee order that "the Court appointed the special master to aid Plaintiff's lead counsel learn the procedures for preparing for trial, including organization of relevant evidence and the calculation of damages, and to help him learn to present the legal aspects of the case to a court" and that "Plaintiffs' counsel's unrealistic and legally unsupportable damages calculations had derailed settlement prior to suit" (R543-7). Respectfully, the district court has stated in writing and at a hearing why it appointed a special master, and it had nothing to do with pre-suit settlement demands. (R569-20-21). *At the time that the court appointed the special master, it did not know anything about the pre-suit settlement demands, because those were only made known to the Court well after the litigation ended, after the Defendants filed their Motion for Sanctions.* (R527).

Moreover, the court ordered the special master be compensated at the rate of $350.00 per hour, to be

paid equally between the parties "for the first six hours of their meeting with the special master. After that, the special master could submit a recommendation to the Court, as to which party should bear the costs for the incremental hours." (R421). Weisberg billed well in excess of six hours for his work, and never suggested that Plaintiffs should pay any more than the Defendants for his services. On April 19, 2007, at the pretrial conference, the court complimented counsel, and stated "Our special master Mr. Weisberg was kind enough to fill me in on the good work that was accomplished today", and then the court complimented counsel. (R570;R571).

Plaintiffs submitted revised Rule 1006 summaries containing estimated weekly estimates for the time that they spent working rather than averages per week as they had in the past, because it was unclear if the Court was going to let the drivers testify as to an average number of hours worked, and Defendants moved to strike the summaries, and filed a Motion for Involuntary Dismissal allegedly for fabrication of evidence (R428), which the Court denied. The Plaintiffs then all accepted their offers of judgment, which resulted in Final Judgments in their favor. (R427;R429;R430;R434;R435;R439;R441;R442; R444;R445;R448-452;R454;R469-483). These final judgments add up to approximately $300,000 in back due overtime that was paid. The lowest that any driver received was $2,500.00 and the highest that any driver received exceeded $62,000. (R427;R449). The offers of judgment stated that Plaintiffs would be

entitled to their reasonable attorney' fees and costs. (R427 & Ex.1). As soon as the first Plaintiff accepted the offer of judgment, the Defendants tried to revoke their offers of judgment (R429), but the district court held that they had to remain open for ten (10) days. The Defendants claimed that they were going bankrupt, and thus the Plaintiffs sought to add the real party in interest – the private equity firm, Chartwell Investments, Inc., that owns the Defendants (R458), but that Motion was denied. (R468).

After the offers of judgment were accepted, the court held a hearing, and asked the Plaintiffs present (including McIntyre and Powell) whether they were satisfied with the results, and they stated that they were. (R484-2-4, 6). The court stated that it wanted to "thank the counsel", that the damages calculations were "very detailed", that it would have taken "15 days to try this case", and the court stated that it would "like to compliment the parties and counsel." (R484-4). The court acknowledged the complicated nature of the case by stating that the jury instructions were 17 pages in length "and the case was complicated enough that I was going to give instructions before the jury began", and the court continued: "[s]o I just want to thank counsel very, very much." (R484-11). The court was "glad that Mr. Boreth is back with us and I'm sure that Mr. Kleppin is pleased that he is back, because it's very hard to handle a case of this size all by yourself when you're also worried about someone else's speedy recovery and their health. So I'm very, very pleased that you are

back and in good health and here to help your partner." (R484-12-13). The court then stated: "I do hope that everyone will take a moment to decompress and to celebrate a peaceful resolution. The Beatitudes are there for a reason: 'Blessed are the peacemakers, for they shall be called the children of God.' And it is true that those that can resolve things are not heralded enough as those who really make a difference." (R484-13).

After the Final Judgments were issued, Plaintiffs filed a Motion to Tax Costs, seeking to tax $39,414.44 as costs (R485), although the Plaintiffs spent approximately $80,000 in out of pocket costs. (R527-15). Plaintiffs filed a Motion for Attorneys' Fees seeking $481,887, but, even though Plaintiffs, as the prevailing party, prevailed on all of their claims against the Defendants (the offers of judgment and Final Judgments issued pursuant thereto clearly state that, as there was one count in the Fourth Amended Complaint) and are therefore entitled to all of their attorney fees, Plaintiffs *excluded* all billing, which totaled 129.6 hours, for work spent on the collective action motion, the Motion to Sever and Compel to Arbitration certain claims, the attempt to utilize Dennis North as an expert witness, and the retaliation claims of Powell that were severed. (R520-7). Plaintiffs thought that they were submitting a conservative Motion for Attorneys' Fees by deleting these time entries. Attorney Kleppin sought $270.00 per hour, because he had recently been awarded that rate by Judge Dimitrouleas in another case, and

attorneys Glasser and Boreth sought $450.00 hourly rates because they had recently been awarded such rates, and defense counsel in that case fought the fees motion vigorously but conceded that those rates were appropriate. *James v. Wash Depot Holdings, Inc.*, 489 F.Supp.2d 1341 (S.D. Fla. 2007).

On the same day that Plaintiffs filed their Motions to Tax Costs and for Attorneys' Fees, the Defendants filed a Motion for Sanctions, which ostensibly sought to recover all of Defendants' fees from the beginning of the case. (R487). While Defendants' Motion for Sanctions appears to seek sanctions for issues concerning damages disclosures (pp.1-16) and specific motions (pp.16-20), there is an implication in the Motion that because the damages disclosures were early in the litigation they basically prevented settlement and thus fees are sought for the whole case. (R487). Because of this lack of clarity, the court asked defense counsel at the June 13, 2007, hearing for elucidation, and she stated the Motion seeks to recoup all fees from the beginning of the litigation. (R527-2 & n.2). The court informed counsel that she should rethink that idea, but Defendants did not submit an amended motion or file any notice with the court that they are limiting the relief sought in their Motion. (R527-2 & n.2). However, on July 23, 2007, Defendants submitted a letter to Plaintiffs' counsel wherein they state that they are "limiting" their Motion to seeking $246,000 in fees, for seven (7) specific areas of the litigation. (R527-2 & n.2). The

court eventually denied the Defendants' Motion for Sanctions. (R543).

The district court never suggested during the whole two and one-half years of this litigation that Plaintiffs' counsel was driving up fees, and neither did Defendants – surely if Defendants thought Plaintiffs' counsel was causing the improper expenditure of millions in legal fees (R527-2 & n.2), *Defendants would have brought that to the Court's attention, and, under the law (laches), Defendants had that duty. Cordoba v. Dillard's Inc.*, 419 F.3d 1169,1188 & n.14 (11th Cir. 2005). Defendants failed to seek sanctions until well after Plaintiffs accepted offers of judgment and final judgments were issued stating Plaintiffs were entitled to their fees and which said nothing about the recovery of sanctions.

Defendants submitted extremely contentious responses to the Motion to Tax Costs and the Motion for Attorneys' Fees, essentially arguing that Plaintiffs should receive hardly any cost reimbursement, and essentially no attorneys' fees. (R497;R503). The Court did not hold a fee-hearing, but during another hearing during which defense counsel wanted to disclose to the Court certain facts from the mediation, but Plaintiffs' counsel objected to disclosing only some information from the mediation, and took the position that all information from the mediation should be able to be shared with the Court or no information. (R512;R513). When Plaintiffs reviewed the Defendants' Response to the Motion for Attorneys' Fees, they noticed that Defendants had improperly

disclosed information from the confidential mediation proceedings in numerous ways, and Plaintiff's thus filed Motions for Sanctions. (R512;R513).

The Court eventually ruled on the Motion for Attorneys' Fees, awarding attorney Kleppin $175.00 hourly rate, and awarding Attorneys Glasser and Boreth no fees. Defendant sought to recover $175.00 for their paralegal for putting together certain documents for the Plaintiffs in this case (R522), and thus Kleppin was essentially awarded a paralegal's rate, even though he successfully obtained summary judgment as to liability, and prevailed on all causes of action brought by his clients. Then the Court reduced the "lodestar" by 67% for a whole host of reasons, blaming the Plaintiffs for refusing to settle, running-up attorneys' fees by noting that "[t]he disturbing undercurrent in this case from the outset has been on what will ultimately generate the greatest fees rather than legitimate recovery for the Plaintiffs." (R543-6-7). Before that Order (entered on March 11, 2008), the Court gave the Plaintiffs no hint that it felt that way, but rather accused defense counsel of that very thing at the October hearing (mentioned above), nor had the Defendants ever accused Plaintiffs' counsel of trying to "generate the greatest fees" or anything similar to that. The damages calculations that Plaintiffs had given previously, were just that calculations, not demands, and there was never any suggestion in this case that those calculations interfered with or prolonged possible settlement.

The district court disregarded record evidence and made conclusions contrary to the record evidence to justify drastically reducing attorneys' fees. That is contrary to this Court's precedent that abuse of discretion standard applies to awards of attorneys' fees. For example, the district court's following findings are contrary to the record evidence: 1) the Defendants "did not contest that Plaintiffs should be treated as employees. Thus, the simple triable issue was the number of compensable hours for each Plaintiff" (R543-6), but the truth is, the Defendants claimed that they had a reasonable belief that they thought the drivers were independent contractors which precluded a finding of willfulness or the imposition of liquidated damages) (R586-88-89), which required that the employee issue would be litigated; 2) "the disturbing undercurrent in this case from the outset has been on what will ultimately generate the greatest fees rather than legitimate recovery for Plaintiffs" (R543-6-7), when the court specifically found in October, 2005, several months in the suit that the Defendants were the cause of the fees (R520-Ex.8 at pp.18-19); 3) "Plaintiff's counsel's actions delayed the resolution of the action for two years and actually resulted in Plaintiffs Powell, Betancourt, McIntyre, and Sarfaraz receiving less than they would have received had they settled their claims prior to [instituting] this action" (R543-8-9), but the truth is that Powell received more money, Betancourt and McIntyre wanted to accept their pre-suit settlement offers, but the Defendants would not let them unless every single plaintiff settled and Powell agreed

to quit his job with Defendants (R520-5 & Ex.2 at p.2); those facts do not warrant reducing fees by $400,000; 4) "[t]he parties have not presented evidence of any preliminary offers to the other 11 Plaintiffs" (R543-9 n.9), that is utterly false, as the parties submitted the demand letters pre-suit, which showed that Errol Robinson and Viliam Kralovic received more money than they were offered by the Defendants (R520-6 & n.4;R435;R454); 5) "notwithstanding the fact that this legal issue [whether the drivers were entitled to half-time or time and one-half overtime pay] had been previously determined under identical circumstances, Plaintiffs did not implement this method when estimating damages during both the settlement negotiations prior to suit and throughout the litigation" (R543-9), that is absolutely false, as the Plaintiffs calculated their damages using a half-time measure pre-suit, and also in the Joint Scheduling Report (R48-21-23;R520-4 & Ex.1); 6) "on the eve of trial, Plaintiffs were able to provide specific calculations of work hours on a weekly basis . . . with detailed figures of actual hours worked" (R543), that is false, as the figures given even on the eve of trial were nothing but estimates that were no more accurate than the averages given (Reply Brief at 32); 7) having "800 exhibits and [ ] over 90 witnesses" (R543-11), there were fifteen parties, and while there were 800 exhibits, many of those were composite exhibits, as the real amount of documents in the case was approximately 100,000, which is one reason why the case required significant expenditure of fees; 8) the court's finding that Kleppin's work was "sloppy,

inaccurate, and reflected poor legal analysis" when the court stated that Kleppin "write[s] beautifully" (R569-9); 9) punishing the Plaintiffs for re-litigating the calculation of overtime finding from Judge Ungaro in previous litigation between different parties (R543-14), while not punishing the Defendant for re-litigating the employee issue (at least as willfulness and liquidated damages) and re-litigating the motor carrier exemption; and 10) reducing the lodestar by 67% because of Plaintiffs' counsel's "refusal to aid in settlement of this case in the early stages" (R543-21), when the truth is that Defendants ended settlement negotiations, and said that they would not settle, even Plaintiffs' counsel told them that two of the Plaintiffs wanted to settle. (R527-Ex.21).

Notably, neither Defendants nor the court point to any method of calculation that was used by Plaintiffs' counsel that does not have at least some support in the law, or mathematical (formulaic or otherwise) error that caused some sort of improper damages calculation. (R527-15). The only actual demands that were provided and are discussed in Defendants' Motion are the pre-suit demands. (R527-15, 1-5). The "demands" that the court references (R543-7-8) are not demands, but are rather the Defendants putting into chart form the damages as calculated annualized. (R527-15-16). The charts in the Defendants' Motion for Sanctions on pp.8-11 were misleading, because the Defendants failed to inform the court that the social security damages were to be paid to the government, not the Plaintiffs, and the

Defendants fail to state that they are based on a six-year statute of limitations. (R527-15-16). Plaintiffs asked the district court, concerning the $13,000,000 sum total on page 10 of Defendants' Motion for Sanctions, that is should be considered by the court in the same way that it was explained to defense counsel in the case: it is cut in half simply by applying a 3-year statute of limitations ($6,500,000) it is cut by one-third if willfulness is taken out of the equation ($4,300,000), it is cut in half again by taking away liquidated damages ($2,650,000), it is cut by approximately two-thirds, if a half-time measure, rather than time and one-half is applied ($800,000), and, instead of it being annualized, if it is based on weekly records, it is cut by about half ($400,000), which is approximately the final number arrived at that Plaintiffs were going to seek at trial. (R527-15-16). The fifteen Plaintiffs ended up recovering approximately $300,000 out of the approximately $400,000 that they were going to seek at trial. A timely Appeal followed. (R549).

In September, 2008, after this Appeal was pending, the district court ruled in the *Perez* retaliation case that Kleppin had "impressive credentials" as a lawyer. *Perez v. Carey Int'l, Inc.*, 2008 WL 4490750 n.4 (S.D. Fla. 2008). The district court judge has since recused herself from the *Perez* case, because she has participated in proceedings involving Mr. Kleppin, and a recusal motion is pending (fully briefed) in this case.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DEMONSTRATES THE SPLIT IN THE CIRCUITS CONCERNING WHETHER ATTORNEYS' FEES ARE SUBJECT TO REDUCTION WHEN THE PLAINTIFF ULTIMATELY RECEIVES LESS DAMAGES THAN HE CALCULATED AT SOME POINT IN THE LITIGATION OR WAS OFFERED AT SOME POINT IN THE CASE.

The Eleventh Circuit in this case held specifically that Plaintiffs submitted a damage calculation that compared with what they eventually obtained in the case warranted that the attorneys' fees were properly reduced for lack of success, which is essentially what the district court found. There is a Fifth Circuit case in agreement with this. *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795 (5th Cir. 2006) (holding that a low damage award when compared to damages sought, calculated, or demanded is one factor a court can use to reduce a requested fee). However, there are cases from other circuits which specifically hold the opposite. *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994) (holding that it was proper not to reduce the attorneys' fee award, although the plaintiff received less than what he was offered by the defendant during the litigation and less than what he calculated his damages to be); *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995) (holding that when a plaintiff prevails on his cause of action, attorneys' fees should not be reduced merely because the plaintiff did not recover

all of the damages that he sought, because seeking high damages, but missing the mark is a "sound tactic"); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (awarding $160,000 in attorneys' fees for obtaining a $33,000 judgment).

These cases are similar because the plaintiff prevailed on his cause(s) of action, but did not obtain all of the damages that were sought. Thus, these are not cases in which the plaintiff lost on some theories and won on others, so the fees were reduced for lack of success for various claims. This Court has spoken on this issue previously, *Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 440 (1983) (holding that when a party prevails on their causes of action, "[i]n these circumstances, the fee award should not be reduced simply because the [party] failed to prevail on every contention raised in the lawsuit"), but the district court and the Eleventh Circuit disregarded this language from *Hensley*, though it was cited to them, and the other circuits did not apply this language either.

In fact, there are numerous cases which hold that even lack of success on causes of action does not warrant reduction in attorneys' fees, including by this Court. *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (allowing recovery of $245,456 in attorneys' fees when plaintiff only recovered $13,300 and he sought much more); *Wales v. Jack M. Berry, Inc.*, 192 F.Supp.2d 1313, 1328 (M.D. Fla. 2001) (allowing recovery of $352,225 in attorneys' fees when multiple plaintiffs only recovered $21,000, and that amount was

significantly less than what the plaintiff could have received had they accepted offers of judgment that were served upon them months previously). Accordingly, this Court needs to weigh in and resolve this split in the circuits and uncertainty concerning fee awards, particularly since "[t]he purpose of the FLSA attorney fees provision is to insure effective access to the judicial process by providing attorneys' fees for prevailing plaintiffs in wage and hour grievances." *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994). The Court should note that FLSA cases are 30% of the docket in the Southern District of Florida. *Hamm v. TBC Corp.*, 597 F.Supp.2d 1338 (S.D. Fla. 2009). Further, the courts have held that a $10,000,000 demand, because it did not multiply the proceedings, should not result in sanctions. *Robinson v. Alutiiq-Mele, L.L.C.*, ___ F.Supp.2d ___, 2009 WL 2424653 (S.D. Fla., Mar. 30, 2009).

Fees should never be reduced just because a plaintiff did not receive all of the damages that could possibly be included in a damage calculation, because that would cause a conflict of interest between the lawyer and the client, as the lawyer would face the decision of whether to calculate the damages unreasonably low, lest the court award significantly lowered fees. Damages calculations, if they have some support in the law and are not used to interfere or inhibit settlement (and there is no proof of that here), should not be used to lower attorneys' fees, as they are irrelevant to an award of fees. In any event, the facts of this case scream out for an appropriate fee

award, and not a $400,000 reduction from a judge who has since realized she should recuse herself in Mr. Kleppin's cases, and who admitted when faced with Mr. Kleppin's achievements as a lawyer (approximately 50 published decisions on Westlaw that show he prevailed on summary judgment, and at one point he had won six trials in a row), that he had impressive credentials, despite the drastic reduction in fees she made in this case.

There is "[a] strong presumption that the lodestar figure . . . represents a 'reasonable fee'". *Pennsylvania v. Delaware Valley*, 478 U.S. 546,565 (1986). Thus, the district court's decision was contrary to this Court's precedent when it awarded Mr. Kleppin $175.00/hr, since he has been awarded $300.00 per hour in fees. *Tesma v. Maddox-Joines, Inc.*, 2009 WL 230158 (S.D. Fla. 2009); *Josendis v. Wall to Wall Residence Repairs, Inc.*, 2009 WL 454558 (S.D. Fla. 2009). Mr. Kleppin has had numerous reported decisions where his fees were either $270.00 per hour or $250.00 per hour. *James v. Wash Depot Holdings, Inc.*, 489 F.Supp.2d 1341 (S.D. Fla. 2007); *Herard v. ATN Restaurant, Inc.*, 2007 WL 4302703 (S.D. Fla. 2007); *Murray v. Playmaker Servs., L.L.C.*, 548 F.Supp.2d 1378 (S.D. Fla. 2007); *Lane v. CAMCO*, 554 F.Supp.2d 1345 (S.D. Fla. 2008). It was wholly improper and inconsistent with the lodestar method for district court to award him $175.00 per hour, the amount the Defendants' paralegal charged for the copying.

The district court found that Kleppin's performance was "akin to a new associate", which finding is clear error, particularly when the court stated on April 19, 2007 that Kleppin "write[s] beautifully and clearly." (R569-9).

II. THERE IS A SPLIT IN THE CIRCUITS REGARDING WHETHER CONTRACT PRINCIPLES APPLY TO RULE 68 OFFERS OF JUDGMENT.

This Court should also grant review on the ground that the opinions below run contrary to Rule 68 (pertaining to offers of judgment), as such offers have been construed by the courts to have common law contract principles apply to them. *Erdman v. Cochise County, Arizona*, 926 F.2d 877, 880 (9th Cir. 1991) (offer of judgment analyzed the same as any other offer to contract); *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988) ("to decide whether there has been a valid offer and acceptance for purposes of Rule 68, courts apply contract principles").

In this case, contract principles would require that the Plaintiffs receive their attorneys' fees, but they did not, they only received a small portion of them. Thus, the courts did not apply contract principles to the offers of judgment, in contrary manner to the Eighth and Ninth Circuits. The D.C. Circuit is in agreement with the Eleventh Circuit on this issue. *Richardson v. National R.R. Passenger Corp.*, 49 F.3d 760, 764 (D.C. Cir. 1995) (offer of judgment should

not be analyzed under normal contract principles, because they are not normal contract offers).

Further, the whole purpose of offers of judgment is to encourage settlement, *Marek v. Chesny*, 473 U.S. 1 (1985), but here the acceptance of the offers of judgment led to a whole major second litigation as to attorneys' fees and sanctions. In this case, the lower courts did not apply those contract principles.

Here, the Defendants offered to allow the Plaintiffs to receive their attorneys' fees in the offer of judgment, and this should have been construed by the courts below under contract principles, to simply allow the Plaintiffs to recover their entire fee in the case. As set forth above, significant billing judgment was used in the case, to reduce almost 200 hours from the total for certain motions that the court did not seem to like, and it was error for her to reduce the lodestar simply because those motions were filed, when fees were not sought for them. In any event, this Court should resolve the split in the circuits over whether contract principles apply to offers of judgment.

The Plaintiffs argued below that they should have received their full fees because of the following facts:

- Defendants served offers of judgment (totaling about $300,000) on the Plaintiffs which, also offered to pay Plaintiffs' counsel's fees, as determined by the Court, and which stated that they were

provided "in settlement ... in the interest of judicial economy to the Court, the parties and their attorneys", see, *e.g.*, exhibits to [D.E. 427, 430, 434, 435, 439, 441-54]; while the Defendants attempted to withdraw or revoke the Second Offers of Judgment and submitted new offers in their place (the only change was the dollar amount), none of these offers stated anything about the Defendants being entitled to their fees or that they intended to file any sanctions motions for misconduct in the litigation;

- The Court entered a Final Judgment as to each Plaintiff which did not reserve jurisdiction for sanctions motions to be filed; [D.E. 469-83]; and
- Defendants' "misconduct" argument was never raised by Defendants prior to service and acceptance of the offers of judgment and entering of the Final Judgments; their actions constitute nothing less than fraudulent inducement to trick Plaintiffs into accepting the offers being led to believe that their counsel's fees would be paid by Defendants; if Defendants intended to seek $250,000 in sanctions, the offers should have so stated.

(R527-10). There are public policy concerns here, since parties are not going to accept offers of judgment if they know that to accept such an offer as a settlement means there would be a "fist behind the

velvet glove." It is clear from Defendants' offers of judgment that they provided the offers of judgment to the Plaintiffs to "settle" this case, as the offers of judgment stated that they were made as a "settlement . . . in the interest of judicial economy to the Court, the parties and their attorneys". A settlement in the interest of judicial economy means finality to the litigation. It is unconscionable for Defendants to file a twenty-page Motion seeking hundreds of thousands in sanctions which is not mentioned in the "settlement" – the offers of judgment. Certainly, it must be concluded that the Defendants really were not interested in settling this case for judicial economy, given that they decided to file this Motion. Defendants readily admit that they "chose not to file a motion for sanctions specifically addressed to . . . any . . . motion or conduct in this litigation . . . while claims were pending [meaning, while the litigation was ongoing]". (R527-19 n.27). This means that the Defendants knew all along that they intended to file a Motion for Sanctions, but decided not to inform the Plaintiffs or their counsel about this fact, and decided not to disclose their intentions in their proposed "settlement". As set forth above, this requires that they resolve the issue and defend its precedent that contract principles apply to offers of judgment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 2009

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11523

D. C. Docket No. 05-21395-CV-PAS

GEORGE POWELL,
VILIAM KRALOVIC,
ANOUSHEH SARFARAZ,
MARK DONAHAY,
ERROL ROBINSON,
CARLOS BETANCOURT,
ALPHONSO MCINTYRE,
LUIS LOIZARO,
MIOMIR MAUSIMCEV,
ED MAZZEO,

Plaintiffs-Appellants
Cross-Appellees,

FRANCISCO RENGIFO,
OSCAR R. PEREZ,
JOHN JOSEPH HUMPHREYS,
WILHELM BRAGA PEREIRA,
JUAN C. ALBA,

Plaintiffs-Counter-
Defendants-Appellants
Cross-Appellees,

ALVIN J. HARVARD, et al.,

Plaintiffs,

GLASSER, BORETH & KLEPPIN,

Interested-Party-
Appellant Cross-
Appellee,

versus

CAREY INTERNATIONAL, INC.,
a Delaware corporation qualified to
do business in the State of Florida,
CAREY LIMOUSINE FLORIDA, INC.,
a Delaware corporation qualified to
do business in Florida,

Defendants-Counter-
Claimants-Appellees
Cross-Appellants,

VINCE WOLFINGTON, et al.,

Defendants.

Appeals from the United States District Court
for the Southern District of Florida

(April 21, 2009)

Before CARNES, HULL and COX, Circuit Judges.

PER CURIAM:

The appeal by the plaintiffs in this case raises a number of issues involving the district court's order awarding attorney's fees, and the cross-appeal questions the district court's order denying defendant's motion for sanctions. The standard of review

applicable to all of the issues is abuse of discretion, and the discretion afforded the district court in these matters is considerable. We have read the briefs and the pertinent parts of the record, engaged counsel, concerning the issues at oral argument, discussed the matters at some length among ourselves, and thoroughly considered all of the arguments. Having done so, we are convinced that the district court did not abuse its discretion in any of the actions that were raised in the appeal or cross-appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 05-21395-CIV-SEITZ/MCALILEY

GEORGE POWELL, et al.,

Plaintiffs,

v.

CAREY INTERNATIONAL, INC., et al.,

Defendants. /

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND DENYING DEFENDANTS' MOTION FOR SANCTIONS AND PLAINTIFFS' THREE MOTIONS FOR SANCTIONS

THIS MATTER is before the Court on five separate motions: (1) Plaintiffs' Motion for Attorneys' Fees [DE 486]; (2) Defendants' Motion for Sanctions Against Plaintiffs' Counsel [DE 487]; (3) Plaintiffs' Motion for Sanctions Against Defense Counsel and Motion to Strike Defendants' Response to Plaintiffs' Motion for Attorneys' Fees [DE 512, 514]; (4) Plaintiffs' Motion for Sanctions Against Non-Party Samuel Terilli [DE 513]; and Plaintiffs' Motion for Sanctions Against Defendants [DE 532].[1] Plaintiffs'

[1] Defendants' motion for sanctions makes the same arguments included in their response to Plaintiffs' motion for attorneys' fees. Having discussed all the issues addressing

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seek attorneys' fees in the amount of $481,887. Defendants, on the other hand, argue that Plaintiffs are not entitled to any fees, or alternatively, a significantly reduced sum. Having reviewed the motions, the supporting documents, the relevant legal authorities, and having observed the conduct of all counsel in this case, Plaintiffs' counsel shall be awarded $88,623.15.

I. Background

Plaintiffs, limousine drivers, originally filed this wage and hour case under the Fair Labor Standards Act ("FLSA") on May 24, 2005.[2] Although Plaintiffs had employment agreements which denominated them as independent contractors, the Defendants elected to defend on the ground that Plaintiffs were employees (1) exempt under either (a) the motor carrier exception or (b) the taxicab exception, or in the alternative, that (2) the amount of unpaid overtime under the FLSA was significantly less than

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Plaintiffs' motion for fees, the Court will deny as duplicative Defendants' motion for sanctions [DE 487]. Plaintiffs have also moved for sanctions against defense counsel based upon Defendants' motion for sanctions [DE 532]. However, because Plaintiffs' motion commits the same sin as Defendants' motion for sanctions, the Court will deny it, thus administering equal treatment for the same conduct.

[2] Eight of the Plaintiffs are also involved in a lawsuit against the same Defendants for retaliation under the FLSA. *See Perez v. Carey International, Inc.*, Case No. 06-22225-Civ-Seitz/McAliley ("*Perez*").

Plaintiffs demanded. After extensive, acrimonious litigation, by April 30, 2007, on the eve of trial, all 15 Plaintiffs remaining in the case had accepted offers of judgment.[3] The Court entered the following judgments for each Plaintiff: (1) Juan Alba – $25,395; (2) Carlos Betancourt – $2,500; (3) Mark Donahay – $2,500; (4) John Humphreys – $26,541; (5) Viliam Kralovic – $2,500; (6) Luis Lozaro – $4,750; (7) Miomir Maksimcev – $50,548; (8) Eduardo Mazzeo – $29,998; (9) Alphonso McIntyre – $5,500; (10) Wilhelm Pereira – $29,540; (11) Oscar Perez – $31,593; (12) George Powell – $15,530; (13) Francisco Rengifo – $62,235; (14) Errol Robinson – $2,510; and (15) Anousheh Sarfaraz – $2,500. The sum of these judgments is $294,140.

As prevailing Plaintiffs under the FLSA, Plaintiffs and their counsel seek $481,887[4] in attorneys' fees for a portion of the work involved in obtaining judgments on their FLSA overtime claims.

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[3] The Court severed and compelled eight separate Plaintiffs to arbitration on November 15, 2006, and their claims remain pending. (*See* DE 240.)

[4] The breakdown of Plaintiffs' fee request is as follows:

Lloyd Glasser ("Glasser"):	$21,915	($450/hours x 48.7 hours)
Harry Boreth ("Boreth"):	$45,630	($450/hour x 101.4 hours)
Chris Kleppin ("Kleppin")	$414,342	($270/hour x 1,534.6 hours)
Total	**$481,887**	

Note: Plaintiffs incorrectly calculate the sum of fees for Glasser and Boreth to be $60,750 when the correct calculation is $67,545. (Plaintiffs' Motion at 11.) However, the amount of total fees sought for all attorneys reflects the correct number.

Defendants vigorously object to the award of any fees in this matter and alternatively argue that if fees are awarded that the amount should be significantly less than what Plaintiffs request. Defendants reiterated their arguments in a motion for sanctions. Plaintiffs responded with three motions for sanctions against Defendants' counsel and a third party. Because the various sanctions motions duplicate the points raised in the motion for attorneys' fees or relate thereto, all five motions shall are addressed together.

II. Discussion

In the United States, the "American Rule" provides that, absent a contrary direction from Congress, the prevailing party in a litigation is not ordinarily entitled to recover attorney's fees from his opponent. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The FLSA, however, explicitly provides that a court "shall, in addition to any judgment awarded to plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Thus, fee awards are mandatory for prevailing plaintiffs in FLSA cases. *See Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542 (11th Cir. 1985); *Shelton v. Ervin*, 830 F.2d 182, 184 (11th Cir. 1987) ("Section 216 provides for an award of attorney's fees, as opposed to granting the court discretion in awarding such fees, to the prevailing plaintiff in FLSA cases."). The Supreme Court has held that a party is a "prevailing party" for purposes of an

attorney's fee award if the party "succeeded on any significant claim affording it some of the relief sought." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989). There is no meritorious dispute that Plaintiffs, who all accepted offers of judgment, are the prevailing parties in this action with respect to their FLSA overtime claims, and as such, are entitled to an award of reasonable attorneys' fees.

In the Eleventh Circuit, the framework for awarding attorney's fees to prevailing plaintiffs rests on *Norman v. Hous. Auth. of the City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988) and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The fee award analysis begins with a determination of the "lodestar." This lodestar is the number of hours reasonably expended in a litigation multiplied by a reasonable hourly rate. *See e.g. Hensley*, 461 U.S. at 433; *Norman*, 836 F.2d at 1299. While the "lodestar" method effectively replaced the balancing test previously prescribed by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 117-19 (5th Cir. 1974),[5] the twelve *Johnson* factors[6] "might still be considered

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[5] All decisions of the former Fifth Circuit rendered prior to October 1, 1981 serve as binding precedent on the current Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[6] The twelve *Johnson* factors are:

1) the time and labor required;
2) the novelty and difficulty of the questions;

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in terms of their influence on the lodestar amount." *Norman*, 836 F.2d at 1299. The burden of establishing the number of hours reasonably expended lies with the plaintiff, and "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433; *see also Norman*, 836 F.2d at 1303. Similarly, a plaintiff has the burden of establishing that the hourly rate requested is a reasonable one. *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

The determination of reasonableness lies in the sound discretion of the trial court. *Norman*, 836 F.2d at 1301. In determining whether the number of hours expended on the litigation was reasonable, the district court should exclude from its initial fee calculation "hours that are excessive, redundant, or

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3) the skill requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to acceptance of the case;
5) the customary fee;
6) whether the fee is fixed or contingent;
7) time limitations imposed by the client or the circumstances;
8) the amount involved and the results obtained;
9) the experience, reputation, and ability of the attorney;
10) the "undesirability" of the case;
11) the nature and length of the professional relationship with the client; and
12) awards in similar cases.

Johnson, 488 F.2d at 117-119.

otherwise unnecessary." *Hensley*, 461 U.S. at 434. Also, in making this calculation, the court should exclude "time spent on discrete and unsuccessful claims." *Norman*, 836 F.2d at 1302. "The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435. Fee applicants are required to exercise "billing judgment" and exclude these hours from their fee application. *ACLU of Ga. v. Barnes*, 168 F.3d 423 (11th Cir. 1999). "If fee applicants do not exercise billing judgment, courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are 'excessive, redundant, or otherwise unnecessary.'" *Id.*

When determining a reasonable hourly rate, the rate should be "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman*, 836 F.2d at 1299. "Evidence of rates may be adduced through direct evidence of charges by lawyers under similar circumstances or by opinion evidence." *Id.* On the issue of a reasonable rate, a court is itself considered an expert and can make an informed judgment as to a proper award of fees even without the benefit of outside testimony. *Id.* at 1303; *see also Loranger*, 10 F.3d at 781.

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley* 461 U.S. at 434. "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Hensley*, 461 U.S. at 436-37. The most important factor to consider is the result obtained. *Id.* at 436. If the success was limited or the plaintiff's victory was limited, the lodestar must be reduced to reflect the limited result. *Norman*, 836 F.2d 1302; *see also Popham v. City of Kennesaw*, 820 F.2d 1570, 1579-80 (11th Cir. 1987). Fee awards, however, should not simply be proportionate to the results obtained by a plaintiff, *Andrews v. United States*, 122 F.3d 1367, 1376 (11th Cir. 1997) (citing *Riverside v. Rivera*, 477 U.S. 561 (1986)). "Given the nature of claims under the FLSA, it is not uncommon that attorneys' fee requests will exceed the amount of judgment in the case.'" *Tyler v. Westway Auto. Serv. Ctr., Inc.*, Case No. 02-61667-CIV-DIMITROULEAS/TORRES at 9 (S.D. Fla. Mar. 10, 2005) (quoting *Holyfield v. F.P. Quinn & Co.*, 1991 WL 65928, *1 (N.D. Ill. April 21, 1991) (court awarded approximately $7,000 in fees even though the judgment was only $921)); *see also Davis v. Locke*, 936 F.2d 1208, 1215 (11th Cir. 1991) (quoting *Rivera*,

477 U.S. at 574) ("'Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.'"). Before turning to the Eleventh Circuit "lodestar" analysis, it is necessary to discuss Plaintiffs' lead counsel's conduct in this case as it bears directly on the proper hourly rate and the amount of hours for which he should be compensated.

A. Plaintiffs' Counsel's Conduct

As mentioned, Plaintiffs' counsel's fees request of $481,887, which is $187,747 more than Plaintiffs' total recovery, is premised on 1,534.6 hours for Kleppin's time at $270 per hour and 150.1 hours of Glasser and Boreth's time at $450 per hour. While these were not the-run-of-the-mill FLSA cases, they did not involve complicated issues. Unfortunately, Plaintiffs' counsel was never able to grasp or was unwilling to acknowledge the simple legal nature of this case. While Defendants did vigorously raise exemption bars, they did not contest that Plaintiffs should be treated as employees. Thus, the simple triable issue was the number of compensable hours for each Plaintiff. Even responding to Defendants' strenuous defense, this case could have and should have been litigated in less than a third of Kleppin's time. The disturbing undercurrent in this case from the outset has been on what will ultimately generate the greatest fees rather than legitimate recovery for Plaintiffs.

Furthermore, Plaintiffs' counsel's lack of understanding of the substantive and evidentiary law, repeated failures to comply with Court directions and rules, as well as their failure to exercise the critically important independent judgment, prolonged the litigation and generated unnecessary work for both counsel and the Court. This fact bears significantly on the appropriate hourly rate and number of hours that the Court can consider as reasonable in light of the nature of the case. Two examples of Plaintiffs' counsels' behavior which excessively multiplied the time and labor expended and underscored counsel's lack of experience and independent judgment were counsel's actions regarding damage estimates and motion practice.

1. Damage Estimates

Plaintiffs' counsel's unrealistic and legally unsupportable damage calculations derailed settlement negotiations prior to suit, required the hiring of experts and mandated numerous pretrial hearings and briefings and ultimately the appointment of a special master. Such actions require a reduction in the attorneys' fee award. *See Carlson v. Bosem*, Case No. 04-61004-Civ-Zloch at 7 (S.D. Fla. April 9, 2007) (reducing the plaintiff's attorneys' fee award based on the plaintiffs' counsel's abuse of the judicial process including his refusal to give the defendants estimates of damages and his refusal to communicate with opposing counsel and execute his duties to his client). As discussed below, Plaintiffs' attorneys have

undertaken similar actions in this case as the plaintiff's attorney in *Carlson*.

a. Plaintiffs' Unrealistic Damage Demands

Both before and throughout the litigation of this case, Plaintiffs' damage assessments and demands have been patently unreasonable and without legal or evidentiary foundation. Counsel's stubborn refusal to calculate damages realistically precluded pursuit of settlement, unnecessarily prolonged the litigation and increased costs. Several months before the initiation of this action, on February 4, 2005, Plaintiffs submitted a settlement demand for the original five Plaintiffs in an amount in excess of $800,000.[7] (Defendants' Opposition, Ex. 3.) After receiving counteroffers from Defendants in the amount of $34,000, Plaintiffs made counteroffers as to the original five Plaintiffs of approximately $550,000, but requested more than $380,000 for two additional Plaintiffs. (Defendants' Opposition, Ex. 7.) Defendants increased their offer to almost $80,000, plus a lump sum of $30,000 in attorneys' fees. Plaintiffs rejected the offer and filed suit. (Defendants' Opposition, Ex. 8.)

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[7] It was later determined that one of the original five Plaintiffs, Roberto Alas Zarceno, who was incorrectly identified as Robert Alan, had not worked for Defendants since 2000, and thus, did not have any claims.

On August 30, 2005, Plaintiffs gave Defendants their Rule 26 initial disclosures which claimed damages for six Plaintiffs in an amount in excess of $2.8 million. This demand more than tripled the original demands, yet did not include liquidated damages, (Defendants' Opposition, Ex. 9.) Recognizing the problems associated with the disclosures, Magistrate Judge McAliley ordered Defendants to produce to Plaintiffs payroll and trip information for the three years preceding the commencement of this action. (*See* DE 152.) The Magistrate Judge's Order also required the Plaintiffs to file a statement of damages based on Defendants' documents in an "easily readable chart that includes the amount of attorney's fees (hours and rate) incurred to date." Moreover, during this same period of time, because additional Plaintiffs joined the lawsuit (*see* DE 155, 167), Defendants sought additional damage estimates, (Defendants' Opposition, Ex. 12-26.) Plaintiffs responded with calculations on a per Plaintiff basis that resulted in total damages exceeding $15 million, not including attorneys' fees.[8] (*See id.*)

Notwithstanding the "calculations" purporting to support total damages of $15 million for the 15

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[8] For example, with regard to Plaintiff Alba, the calculations are based on the proposition that Alba worked 13 hours a day, 7 days a week for over two years, with a few weeks for vacation. (Defendant's Opposition, Ex. 12.) Additionally, according to Plaintiffs' calculations, Plaintiff Maksimcev worked 15 hours a day, 7 days a week for over two years, with a few weeks for vacation. (Defendants' Opposition Ex. 18.)

Plaintiffs, not including attorneys' fees, Plaintiffs' counsel's actions delayed the resolution of the action for two years and actually resulted in Plaintiffs Powell, Betancourt, McIntyre and Sarfaraz receiving *less than they would have received had they settled their claims prior to instigating this action.*[9] (*See* Defendants' Opposition, Ex. 8; DE 444, 452, 427, 451.) Notably, Plaintiff McIntyre received over $27,000 less than the original May 13, 2005 offer and Plaintiff Sarfaraz received over $11,000 less than the initial offer.

b. Plaintiffs' Failure to Provide Legal or Evidentiary Support for their Damage Calculations

Not only were Plaintiffs' damage estimates unrealistic, they were also calculated using a formula that the Court previously rejected. (*See Foody v. Carey International*, 04-21104-Civ-Ungaro, November 10, 2004; DE 32.). In *Foody*, a case identical to the one at bar as to Defendants and in which both Kleppin and Boreth were counsel of record for the plaintiffs, Judge Ungaro rejected the plaintiffs'

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[9] Defendants' May 13, 2005 offers to Plaintiffs Powell, Betancourt, McIntyre and Sarfaraz as well as the ultimate amount recovered are as follows: (1) Powell – $27,000 offered, $15,530 recovered; (2) Betancourt – $3,000 offered, $2,500 recovered; (3) McIntyre – $32,650 offered, $5,500 recovered; (4) Sarfaraz – $14,000 offered, $2,500 recovered. The parties have not presented evidence of any preliminary offers to the other 11 Plaintiffs.

argument that overtime should be calculated pursuant to 29 C.F.R. § 778.109, and ruled that 29 C.F.R. § 778.112 governed the calculation of overtime for limousine drivers. The difference between the application of the two regulations is sizeable as the former calculates overtime wages at time and a half, and the latter calculates them using a half rate.[10] Thus, notwithstanding the fact that this legal issue had been previously determined under identical circumstances, Plaintiffs did not implement this method when estimating damages during both the settlement negotiations prior to suit and throughout the litigation.

In addition to the fact that there was no legal support for their calculations, Plaintiffs also lacked evidentiary support for their weekly hours estimates. In their initial responses to interrogatories, Plaintiffs stated that because Defendants did not keep records of Plaintiffs' hours, they were entitled to estimate their hours, and based on this methodology, Plaintiffs submitted average weekly hour estimates. However, it became patently clear that such estimates were not based on any identifiable factual foundation. Yet, less than a year after filing the interrogatory responses, in a remarkable about face on the eve of trial, Plaintiffs were able to provide specific calculations of work hours on a weekly basis. (*See* DE 431.)

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[10] For example, if the regular rate is $5.00; under § 778.109 the overtime rate is $7.50; and under § 778.112, the overtime rate is $2.50.

Upon reviewing Plaintiffs' damage estimates, Defendants retained an expert in an effort to generate realistic damage calculations. It was only after seeing Defendants' expert report that Plaintiffs retained Dennis North, CPA to render a report. In response to Defendants' Flaubert motion, the Court struck North's report finding that, among other things, it did not correctly apply the law, specifically 29 C.F.R. § 778.112, to calculate damages. (*See* DE 407.)

When their expert report was stricken, Plaintiffs attempted, on the eve of trial in April 2007, to submit Rule 1006 summaries of the hours of their damage estimates. Defendants' moved to strike the exhibits. At the second pretrial conference on April 19, 2007. The Court reviewed the summaries and held that they did not satisfy the requirements of Rule 1006 because they (1) did not divide total weekly compensation by total hours compensable for that week; (2) provided unsupportable averages for the amount of hours worked by each Plaintiff;[11] and (3) were based on North's expert report which had been stricken. (*See* DE 422.)

In the Order striking Plaintiffs' summaries, the Court required Plaintiffs' counsel to submit revised

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[11] For example, with regard to Plaintiff Alba, the calculations are based on the proposition that Alba worked 72 hours a week for the 124 weeks he was affiliated with Defendants despite Plaintiffs' counsel's in-Court representation that he did not work 72 hours during many of the weeks.

summaries that satisfied the requirements of Rule 1006 by April 20, 2007. (*See* DE 422.) Plaintiffs submitted new summaries which purported to identify each Plaintiffs unpaid overtime wages on a weekly basis. However, the Court granted Defendants' second motion to strike these as well stating the summaries could not be admitted because of severe issues as to their accuracy and such would unfairly prejudice Defendants at this stage in the litigation. (*See* DE 431.) The Court also noted that Plaintiffs had maintained throughout this litigation that it was impossible to calculate hours worked without using averages, yet five days before trial, Plaintiffs were able to provide the Court and opposing counsel with detailed figures of the actual hours worked. Plaintiffs' counsel's actions in demanding grossly inflated and totally unsupported damage claims and ignoring settled law, as well as his inability to prepare proper evidence for trial despite repeated counseling warrant a reduction in the attorneys' fee award.

c. Plaintiffs' Counsel's Inability To Comply With Rules Of Evidence And Court Orders Resulted In The Appointment Of A Special Master

Beginning in February 2007, the Court repeatedly had to instruct Plaintiffs' counsel to pare down the exhibit and witness lists to those relevant to the disputed issues in this case. In the parties' February 9, 2007 pretrial stipulation, Plaintiffs' lists, which

appeared to have been copied from another case, indicated that Plaintiffs intended to introduce over 800 exhibits and to call over 90 witnesses. (*See* DE 338.) The Court reviewed the submission at the February 26, 2007 status conference in light of the triable issues and required Plaintiffs to submit pared down versions by the end of March. On March 27, 2007, Plaintiffs submitted a "revised" exhibit list that still contained over 800 exhibits and a "revised" witness list that included over 60 witnesses that they intended to call at trial. (*See* DE 397, 398.) At the April 5, 2007 pretrial conference, the Court again instructed Plaintiffs' counsel to revise the witness and exhibit lists and to indicate the amount of testimony time needed for each witness. (*See* DE 406.) The Court also implemented a schedule for exchanging the parties' summary exhibits and witness lists with Defendants so that they would be prepared by the April 19, 2007 status conference, which was scheduled specifically for this purpose. (*See id.*)

After reviewing the second revisions of the exhibit and witness lists as well as the "summary" exhibits and considering the amount of time that the Court had previously devoted to assisting the Plaintiffs ensure that the case was trial ready, and the additional close supervision needed to ensure an efficient trial, the Court appointed, with the parties' consent, a special master.[12] (*See* DE 421, 422.) The

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[12] In substance, the Court appointed the special master to aid Plaintiffs' lead counsel learn the procedures for preparing for

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Court specifically tasked the special master with "aiding the parties in resolving objections to deposition designations, determining the reliability of summary exhibits, eliminating irrelevant or cumulative evidence and resolving any other issues or disputes relating to the parties' witness and exhibit lists." (*See* DE 421.) The special master's involvement in the case resulted in the removal of 22 witnesses from the previous witness list and countless exhibits associated with those witnesses. (*See* DE 432.) However, as mentioned, notwithstanding the special master's involvement, Plaintiffs' summary exhibits, purporting to calculate damages did not meet the standards of Fed. R. Evid. 1006 and were stricken.

In summary, Plaintiffs' counsel's inability to take the necessary steps to efficiently and cost effectively present this case to a jury, and his disregard for both the governing rules and the Court's Orders, resulted in wasted time and expense, including the costs associated with the appointment of a special master. Moreover, Plaintiffs' counsel's tactics and approach delayed Plaintiffs' ability to recoup unpaid overtime wages in a timely fashion.

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trial, including the organization of relevant evidence and the calculation of damages, and to help him learn to present the legal aspects of the case to a court.

2. *Plaintiffs' Filings*

The docket in this case contains in excess of 500 docket entries. Throughout, Plaintiffs filed multiple motions that often were a waste of time, money and resources. Furthermore, the submitted work product was frequently sloppy, inaccurate and reflected poor legal analysis or did not follow the Court's Orders and instructions.

Time and time again, Plaintiffs filed motions that were either denied or failed to further the case in any respect and led to months of unnecessary litigation.[13] Just four examples of Plaintiffs' counsel's modus

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[13] Some examples of these motions include: (1) Plaintiffs' Motion to Permit Court Supervised Notice [DE 4]; (2) Plaintiffs' Motion to Strike Previously Undisclosed Exhibits from Defendants' Exhibit List [DE 94]; (3) Plaintiffs' Motion to Strike Motor Carrier Defense and Motion for Sanctions [DE 95]; (4) Plaintiffs' Motion to Strike Defendants' Reply Brief [DE 108]; (5) Plaintiffs' Motion to Strike Defendants' Submission that Violates the Local Rules [DE 289]; (6) Plaintiffs' Motion to Re-Open Case as to Arbitration Plaintiffs [DE 314]; (7) Plaintiffs' Motion for Extension of Time to File Joint Pretrial Stipulation [DE 327]; (8) Plaintiffs' Motion for Joinder [DE 458]; and multiple motions in limine in the days prior to trial. Furthermore, Plaintiffs' counsel's repeated practice of objecting to and briefing every motion, including the most trivial of issues such as extensions of time, caused wasteful expenditure of time and resources. For example, at the outset of this litigation, the parties extensively briefed with lengthy memoranda a notice of pendency of related case, which does not require any briefing, and several motions for extensions of time, which are routinely granted without the need for memoranda in support. (*See* DE 8, 10).

operandi include the following: (1) his actions regarding a collective action; (2) his wasteful summary judgment motions, (3) his motion for reconsideration; (4) and his wish to add a Defendant after offers of judgment had been accepted. Based on a review of the time records, Plaintiffs' counsel may not have sought compensation for the time associated with these motions. However, the examples illustrate the type of conduct that justifies the downward adjustment to the fee application.

(a) Collective Action Conduct

At the outset of the instant lawsuit, Plaintiffs moved to permit Court-supervised notice to pursue this action as nationwide collective action. The Court was aware, however, that Plaintiffs had attempted on numerous occasions in other lawsuits to form a nationwide class of Carey limousine drivers for purposes of suing under the FLSA, and that Judge Ungaro had denied several of these motions. (*See* DE 139.) Moreover, in the instant case, Plaintiffs had submitted only one notice of consent form from an employee outside the Miami/West Palm Beach area, did not support their motion with affidavits describing their pay and working conditions, and failed to provide any evidence that Carey International had a nationwide compensation policy.[14] Finally, the Court

[14] Indeed, in addressing Plaintiffs' counsel's lack of proper support for their motion, the Court included a footnote from a report of Magistrate Judge Klein that outlined Plaintiffs'

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noted its concern about Plaintiffs' counsel's ability to adequately represent the interests of a class stating that "even if Plaintiffs had shown that a nationwide class action would be appropriate, they would have to obtain substitute class counsel before this Court would have conditionally certified a class." (*See* DE 139.)

(b) Wasteful Summary Judgment Motions

The Court closely involved itself in the management of this case in an effort to avoid the contentiousness of the extensive earlier litigation between Plaintiffs' counsel and defense counsel involving other

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counsel's repeated improper conduct in this area. Judge Klein stated:

> Plaintiffs' counsel has been given numerous opportunities through discovery to establish the requirements for a nationwide class. He has been handed a roadmap and a how-to manual in the form of previous rulings and case law. Instead, he has filed successive lawsuits, each time offering a new irrelevant morsel in an abortive attempt to create a nationwide class action. All of these facts which he has claimed were 'new information' were available to him in the earlier cases filed by counsel. Discovery was available to him. Now the time has come to put counsel on notice that if another suit is filed seeking nationwide class certification on the basis of information that was previously available, or in contravention of previous orders or findings, that he faces the real prospect of sanctions under Fed. R. Civ. P. 11 or 18 U.S.C. § 1927.

limousine drivers of Defendants. Because of the briefing problems on the motion to dismiss, the Court held a hearing to discuss the issues that would be raised on summary judgment and the manner in which they would be addressed before the motions were filed. Specifically, the Court admonished the parties to confer and exercise restraint in filing summary judgment motions – they should focus on unresolved legitimate legal issues, keeping in mind that disputed issues of fact preclude summary judgment. The latter instruction was especially germane in light of the fact that Judge Ungaro had resolved many issues in a prior FLSA overtime wage case involving plaintiff limousine drivers, Defendants and the same counsel.[15] *Rodriguez, et al. v. Carey Int'l, Inc.*, case no. 03-22442-Civ-Ungaro (S.D. Fla. November 10, 2004).[16]

However, notwithstanding Judge Ungaro's prior rulings, Plaintiffs' first summary judgment motion

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[15] In her November 11, 2004 Omnibus Order, Judge Ungaro ruled on the following issues: (1) the proper method for calculating the plaintiffs' overtime rate; (2) whether time spent driving to work was compensable; and (3) what payments to include in calculating the plaintiffs' regular rate. (*See* 03-22442-Civ-Seitz, DE 397.)

[16] It appears that Judge Ungaro also experienced Plaintiffs' counsel's abusive filing practices in the previous case as she noted in her September 8, 2004 Order, in reference to several motions to strike the plaintiffs filed in that case, that it was "simply further evidence of Plaintiffs' unexplained and unwarranted duplication of motions in these proceedings." (*See* 03-22442-Civ-Ungaro, DE 238.)

re-raised the issues that Judge Ungaro previously resolved. Specifically, Plaintiffs moved for summary judgment as to the method of calculating damages, whether time spent driving to work was compensable and how to calculate the regular rate. (*See* DE 274.) Not surprisingly, Plaintiffs' arguments were rejected. Moreover, for those issues where questions of material fact existed, such factual disputes should have been readily apparent to Plaintiffs under well-settled law. Additionally, Plaintiffs' second summary judgment motion included eight separate issues and Plaintiffs' counsel often devoted only a single paragraph of argument to a particular claim causing the Court to expend its own resources to resolve the issues. (*See* DE 241.) Moreover, Plaintiffs' counsel actually moved for summary judgment on issues that Defendants had conceded for the purposes of this case such as whether Defendants violated FLSA.

(c) Motion For Reconsideration

A few months after the Court had granted Defendants' motion to sever and compel arbitration as to eight Plaintiffs, Plaintiffs moved the Court to re-open the case as to these Plaintiffs arguing that the costs of arbitration prohibited exercise of their FLSA rights. The Court construed Plaintiffs' motion as one for reconsideration under Fed. R. Civ. P. 60(b) and found it meritless not only because Plaintiffs' unrealistic damage estimates were the reason for the high arbitration costs, but also because Defendants

had agreed to advance the arbitration fee to Plaintiffs.[17] (*See* DE 324.)

(d) Motion To Add Party

Even after having accepted offers of judgment, in another example of improper motion practice, Plaintiffs moved to add non-party Chartwell Investments, Inc. to the action. The Court ruled that the addition of Chartwell at such a late stage in the litigation would be a blatant violation of due process, and that Plaintiffs' allegation that they feared they would be unable to collect the accepted offers of judgment was not supported by the record.[18] (*See* DE 468.)

In summary, Plaintiffs' actions forced Defendants to respond to each filing to clarify the facts and the law and required the Court to schedule extra hearings, supervise special sessions with the special master and expend an excessive amount of resources on a single case. Such actions require a reduction in the ultimate fee award.

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[17] In addition, Plaintiffs moved to include the severed Arbitration Plaintiffs in the February 2007 mediation. However, the Court directed Plaintiffs to the Order severing the Arbitration Plaintiffs' claims in which it stated that all further proceedings regarding these Plaintiffs, including the mediation, were stayed pending arbitration. (*See* D 324.)

[18] Indeed, defense counsel Alex del Russo, represented as an officer of the Court that the offers of judgment would be paid.

b. Calculating the Lodestar

As stated above, Plaintiffs' counsel seeks a total of $481,887. The following is a breakdown of the fees sought:

Lloyd Glasser ("Glasser"):	$21,915	($450/hours x 48.7 hours)
Harry Boreth ("Boreth"):	$45,630	($450/hour x 101.4 hours)
Chris Kleppin ("Kleppin"):	$414,342	($270/hour x 1,534.6 hours)
Total	**$481,887**[19]	

For the reasons discussed, the Court must discount entirely the application of Boreth and Glasser. As to Kleppin, the Court must reduce the billable rate to reflect more accurately the prevailing rate for someone of his experience and the quality of his work product.

1. Boreth and Glasser

Plaintiffs' counsel asks for a $450 per hour rate for Boreth and Glasser for their combined 150.1 hours of work. The Court does not question that the range of customary rates for lawyers with the years of experience of Boreth and Glasser includes the rate of $450. The Court cannot award a fee for their time,

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[19] Plaintiffs' application for attorneys' fees states that Glasser and Boreth "have decades of experience," and Kleppin has been practicing for four years and two months.

however, because their participation did not further the prosecution of this action or effectively aid in resolving this dispute. Kleppin was the counsel in this case. When it was obvious to the Court that he needed the benefit of guidance and judgment of more experienced counsel, the Court required Boreth to attend hearings with Kleppin. However, as described above, counsel's combined years of experience did not prevent Kleppin from seriously faltering in the prosecution of this action. In fact, at the various hearings he was required to attend, Boreth either did not participate or did not provide the kind of mentorship to Kleppin that the Court had hoped for and there is no evidence that he in any way aided in the resolution of this matter. The Court understands that Boreth's medical issues may have prevented his participation, however, given the fact that the majority of his time entries are for mere attendance at the various hearings, the Court cannot justify compensating Plaintiffs' counsel for this time.

With regard to Glasser, in addition to his failure to guide Kleppin through the prosecution of this action, the time entries reveal that his participation was primarily related to the various mediations and other settlement negotiations on the eve of trial. (Plaintiffs' Motion, Ex. 5.) However, there is nothing in the record that reflects that Glasser's participation in this process was either necessary to the mediation or that it helped resolve the case during the period of his involvement. Thus, because Boreth and Glasser did not provide any record evidence of a benefit to the

resolution of this matter, compensation for the time spent on this matter shall be denied.

2. Kleppin: Hourly Rate

Plaintiffs seek a rate of $270 per hour for Kleppin. In support of this rate, Plaintiffs state that he "exhibited outstanding skill, which is apparent from the filings in the docket that resulted in the Final Judgments in favor of their clients for approximately $300,000.00." However, as discussed above, Plaintiffs' strategy of seeking exorbitant, unsupported damages, filing many unnecessary motions and doing so in a careless manner, actually resulted in four of the Plaintiffs receiving less in damages than was offered prior to the litigation of this matter.[20]

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[20] In support of Kleppin's rate, Plaintiffs submit the affidavit of attorney Peter T. Mavrick who states that Kleppin's rate is reasonable in light of the results attained. (Plaintiffs' Motion, Ex. 1 at 5.) It is noteworthy, however, that Mr. Maverick served as plaintiff's counsel in *Carlson v. Bosem*, Case No, 04-61004 (S.D. Fla. April 9, 2007), the previously mentioned FLSA case before Judge William J. Zloch. In that case, Judge Zloch stated the following:

> Mavrick's unwillingness or inability to settle this matter was an unreasonable course of behavior in a direct attempt to garner greater fees from this action. This case was not a complex matter: [the plaintiff] claimed she was owed overtime wages and in [the defendant's] Answer [] he [sic] admitted as much. The only question that remained for litigation was [the plaintiff's] damages, with a variance of a couple

(Continued on following page)

Based on the quality of the papers filed, the in-court presentations and the repeated lack of familiarity with his evidentiary obligations, Kleppin's performance was more akin to a new associate and the customary rate in the community for all associates is in the range of $150 to $350. (Defendants' Response, Ex. 40 (survey of legal fees in Miami area)) The Court has exercised its own independent judgment concerning what rates are appropriate. A court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Norman*, 836 F.2d at 1303. Based upon the record, Kleppin's limited years in the Florida Bar, Kleppin's performance in this matter, and the fact that certain Plaintiffs actually received less than what was originally offered to them in pre-litigation negotiations, the Court finds that a rate of $175 per hour the most appropriate hourly rate for Kleppin.

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thousand dollars between the parties. Yet, the parties allowed this relatively simple matter to erupt into a prolonged and bitter fight that occupies 276 filings, hundreds of thousands of dollars in litigation fees, and an untold burden on the Court's scarce judicial resources.

3. The Number of Hours Expended

Kleppin's lodestar amount at a $175 hourly rate for 1,534.6 hours of work would be $268,555. (*See* Plaintiffs' Motion, Ex. 5.) However, for the following reasons, the Court may not rely on Plaintiffs' fee application. *See Hensley*, 461 U.S. at 437 (stating that "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly.") It improperly includes the following defects: (1) time for unnecessary work, (2) block billing, (3) lack of specificity, and (4) excessive time.

First, Plaintiffs' counsel seeks to be compensated for activities which were not necessary to the litigation. *See Hensley*, 461 U.S. at 434 (stating that a district court should exclude from its initial fee calculation hours that are unnecessary). Specifically, Plaintiffs' counsel seeks compensation for activities that took place because of the parties' inability to communicate. For example, the parties spent time drafting and responding to multiple motions that could have been worked out through professional communication with each other and which would have eliminated the need for Court intervention.[21]

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[21] Some examples of these filings include: (1) motions for extension of time (6/8/05, 10/13/06, 10/23/06, 10/25/06, 10/26/06); (2) motions to stay discovery or for confidentiality (7/22/05, 1/17/06); (3) motions to strike (10/19/05, 12/29-30/05, 1/16/06, 4/18/07); (4) emergency motions (11/15/05, 9/11/06); (5) supplemental motions to compel (10/12/05, 11/17/05); (6) a motion to exceed page limitations (12/5/06); (7) a motion for clarification

(Continued on following page)

Additionally, given the breakdown in communication, counsel constantly drafted letters to address issues that did not warrant such expenditure of time when a telephone call would have accomplished the task more efficiently.[22] Plaintiffs' counsel's overall inability to communicate with defense counsel unnecessarily increased the costs of the litigation and, as such, he cannot benefit from these actions.

Second, Plaintiffs' counsel's time entries are replete with instances of block billing. *American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 429 (11th Cir. 1999) (criticizing block billing). For example, on July 22, 2005, counsel Kleppin makes

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(12/13-14/06); and (8) motions in limine (2/22/07, 3/27/07). (*See, e.g.*, Plaintiffs' Motion, Ex. 5.)

[22] Plaintiffs' counsel's time sheets are replete with time spent reviewing or drafting letters to opposing counsel related to minor issues. The following are a few examples of such time entries: (1) letters regarding time limits or page limitations (8/4/05, 9/8/05); (2) letters regarding the initial joint scheduling report (8/9-30/05); (3) letters regarding unnamed documents (10/7/05, 10/10/05) (3) a letter regarding service of process (11/3/05); (4) a letter about conferrals (1/6/06); a letter about the errata sheets (1/13/08); a letter about initial disclosures (3/30/06); a letter about amending the complaint (5/16/06) and many others. (*See, e.g.*, Plaintiffs' Motion, Ex. 5.) Both sides' counsel's distrust of opposing counsel was patent. Yet, even when the Court attempted to eliminate the opportunities for miscommunications, Plaintiffs' counsel could not let go of the past. Moreover, he continued to give opposing counsel a basis to distrust him. Counsel's emotional involvement in the case clouded his independent judgment and resulted in a pattern of "tit for tat" that makes it impossible to determine the benefit of the activities for which he seeks to be compensated.

the following 12.7 hour time entry: "Drafted Response to Motion to Stay Discovery; drafted Motion for Response to Confidentiality Order; Drafted First Amended Complaint." (*See* Plaintiffs' Motion, Ex. 5 at 5.) Again, on November 30, 2006, Kleppin provides the following description of his work totaling nine hours:

> Draft part of Motion for Summary Judgment re Damages; Draft part of statement of Facts in Support of Motion; review some deposition testimony from the Plaintiffs re the tasks that they performed; review deposition of Hernan Zapata.

(*See id.* at 54.) Indeed, a cursory review of Plaintiffs' counsels' time entries yields in excess of 50 instances of block billing similar to those described above.

Third, the majority of the time entries lack specificity. *See Scelta v. Delicatessen Support Services, Inc.*, 203 F. Supp. 2d 1328, 1334 n.2 (M.D. Fla. 2002) (stating that time entries that are vague or unclear are not compensable). For example, in July 2005, Plaintiffs' counsel includes several entries with the description "Phone call with office re: various issues." (*See* Plaintiffs' Motion, Ex. 5 at 4.) Upon reviewing these time entries, the Court is unable to discern what counsel did. Also, on April 17, 2007, counsel Kleppin states that he spent 4.7 hours "[p]reparing for pretrial conference." (*See id.* at 72.) Counsel fails to specify what he accomplished in this time block so that the Court can determine whether it was necessary. Furthermore, it is noteworthy that counsel's

performance at the April 19, 2007 status conference, which was the second pretrial conference that the Court was required to schedule due to Plaintiffs' counsel's lack of preparation, contributed greatly to the appointment of the special master. (*See* DE 422.) Finally, the 70 pages of time entries include countless references to such activities as "[D]raft letter re addresses and phone numbers" or [p]hone call with LSG re various issues" which fail to aid the Court in determining whether the expenditure of time was proper or necessary. (*See id.*)

Fourth, Plaintiffs' counsel spent excessive time, 120 hours, on such things as witness/exhibit lists that resulted in the appointment of a special master and damage summaries that were ultimately not admitted due to sloppiness and irrelevancy. Even at Plaintiffs' counsel's discounted hourly rate of $175/hour, that equates to $21,000 spent on activities that did not further the Plaintiffs' case. Moreover, Plaintiffs' counsel's inability to pare down the witness/exhibit lists and create damage summaries for trial, resulted in three pretrial conferences and the appointment of a special master.[23] Additionally, Plaintiffs' counsel's time sheet is replete with entries of .1 hour or .2 hours for tasks that could not possibly take that amount of time. For example on page 3 of the time entries, Plaintiffs' counsel had nine separate

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[23] The special master represents that he spent 22.5 hours working with the parties to prepare the exhibit and witness lists for trial.

time entries for less than twelve minutes. (*See* Plaintiffs' Motion, Ex. 5 at 3.) Such entries include twelve minute billing periods for such things as reviewing an Order that is one paragraph long (*see id.*, June 9, 2005 entry) or reviewing a two-line Order granting an extension of time (*see id.* at 7, September 8, 2005 entry). In fact, throughout the 70-pages of time records, Plaintiffs' counsel include over 520 separate entries for activities taking less than 12 minutes long making it difficult for the Court to determine if such time is reasonable or excessive.[24] (*See, generally, id.*)

In summary, Plaintiffs' time records are deficient in several different ways, and such deficiencies are prevalent throughout the 70 pages of entries. Thus, Plaintiffs have not adequately supported their

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[24] Plaintiffs' counsel also cannot be compensated for work that is clerical or duplicative. *Gates v. Barnhart*, 325 F. Supp. 2d 1342, 1348 (M.D. Fla. 2002) (stating that "tasks of a clerical nature are not compensable as attorneys' fees"); *Scelta*, 203 F. Supp. 2d at 1334 n.2 (deducting duplicative time entries). Plaintiffs' counsel includes a few time entries seeking to recover for faxing or calendaring dates. (*See id.*: January 31, 2006 entry; June 15, 2006 entry). Additionally, counsel's time sheet appears to include duplicative time entries. For example, on January 28, 2007, counsel entered two separate entries for reviewing the same documents relating to Plaintiff Donahay. (*See id.* at 59.) It also appears that on both September 25, 2006 and September 28, 2006, counsel met with John Humphreys to prepare for depositions for 3.1 and 3.3 hours respectively. (*See id.* at 42.) While it is conceivable, that such entries are not duplicative but rather consecutive, such distinction should have been adequately described in the time entry.

request for attorneys' fees and a reduction is necessary.

4. Adjustments for the Results Obtained

The Supreme Court has stated that "the extent of a plaintiff's success is a crucial factor that the district courts should consider carefully in determining the amount of fees to be awarded." *Hensley* 461 U.S. at 438 n.14. In this case, in light of the fact that the fifteen Plaintiffs at one point demanded damages in excess of $15 million and ultimately accepted offers of judgment in an amount totaling $294,140, this case merits a reduction for limited recovery. Furthermore, Plaintiffs' counsel's handling of this action, including his refusal to aid in settlement of this case in the early stages, his inability to prepare the matter for trial and his improper fee application, bolsters the need for a downward adjustment.[25]

The Supreme Court has recognized the difficulty in reducing the lodestar to an amount that is reasonable in relation to the amount obtained and has counseled that the reduction may be accomplished by either "identify[ing] specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley*, 461 U.S. at 436-37. Given the multiple deficiencies

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[25] At this point the Court merges the discussion of hourly deductions and the reduction of the overall fee award for the results obtained.

with Plaintiffs' counsel's time records, the Court shall simply make a percentage reduction.

The Eleventh Circuit has upheld reductions under similar circumstances. In *Popham*, for example, the plaintiff prevailed on his excessive force claim, but not his other claims. The *Popham* Jury awarded $30,000 in damages, where the plaintiff requested $2,000,000. The district court awarded attorney's fees in the amount of $16,965.15, representing a 67% reduction, which the Eleventh Circuit upheld. *Popham*, 820 F.2d at 1581. Similarly, in *Andrews*, the Eleventh Circuit emphasized how important it was for a district court to consider the extent of the plaintiff's success. In *Andrews*, the plaintiffs initially sought $3.5 million and ultimately prevailed in a jury verdict recovering only $49,549. Although the district court had reduced the fee award by 78%, the appellate court remanded the case because the district court awarded fees for success on all the CERCLA claims, even though the plaintiffs only succeeded on one claim. *Andrews*, 122 F.3d at 1375 (stating that "[w]here the plaintiff has achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.")

In this case, because Plaintiffs have sought such varied amounts over the course of the litigation, it is difficult to ascertain the exact percentage that was actually recovered. However, at one point Plaintiffs' requested damage awards exceeded $15 million. Thus, the $294,140 in accepted offers of judgment

represents less than a 2% recovery of that demand. While seven of the Plaintiffs ultimately received awards ranging from $25,000 to $62,000, the rest received much smaller awards, including five awards under $2,510. Furthermore, not only was the actual judgment total a fraction of the $15 million demand, four of the Plaintiffs actually received less than Defendants' pre-litigation settlement offer. For example, Plaintiff McIntyre received less than 17% of what he was initially offered and Plaintiff Sarfaraz received less than 18% of what he was initially offered. Thus, given the limited results obtained compared to the initial awards sought, and the fact that some Plaintiffs were actually financially harmed by the litigation, the Court finds that a 67% reduction in fees is appropriate, akin to the reductions in both *Popham* and *Andrews*.[26] In coming to this conclusion, the Court has carefully followed the Eleventh Circuit's admonition that the amount of attorneys' fee recovered should not be a strict proportion of the amount of damages the plaintiff recovered. *Andrews*, 122 F.3d 1376. Accordingly, the amount of attorneys' fees the Court finds to be reasonable and appropriate under the circumstances is $88,623.15. ($268,555 X 33%)

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[26] In *Carlson*, the court having found that the plaintiff's counsel engaged in almost identical misconduct, discounted the attorneys' fee award by almost 97% ($4,725 awarded and $140,310 requested.) (*See Carlson*, Case No. 04-61004-Civ-Zioch, DE 215, 278.)

While it is not a small amount of fees, the Court has kept two facts in mind. First, the fee shifting provisions of the FLSA were designed so that Plaintiffs could still recover under the statute despite the small monetary nature of their claims. Second, the Defendants' conduct in vigorously defending this case did contribute to the price tag on the attorneys' fees award. Defendants' defense necessarily required Plaintiffs' counsel to expend time and effort and such drives up the ultimate charge of attorneys' fees billed to a non-prevailing defendant. *See e.g. Rice v. Sunrise Express, Inc.*, 237 F. Supp. 2d 962, 977 (S.D. Ind. 2002). Weighing all the factors discussed above, the Court finds that the above amount represents a fair, equitable and reasonable amount of attorneys' fees in light of the purposes behind the FLSA and other similar fee shifting statutes, as well as Plaintiffs' limited success notwithstanding the plethora of hours expended litigating this case.

c. Plaintiffs' Motion for Sanctions Against Defense Counsel and Motion to Strike Defendants' Response to Plaintiffs' Motion for Attorneys' Fees and Plaintiffs' Motion for Sanctions Against Non-party Samuel Terilli

By their motions, Plaintiffs complain that Defendants improperly filed as an exhibit to their response to Plaintiffs' fees motion, the affidavit of Samuel Terrilli, which tangentially relates to statements

made at mediation. Plaintiffs argue that such inclusion is a violation of the Local Rules for the Southern District of Florida, Florida state law, the Court's Orders and federal case law, and seek sanctions against defense counsel and non-party Samuel Terilli under the Court's inherent power. Plaintiffs also seek to have Defendants' response in opposition to Plaintiffs' motion for attorneys' fees stricken from the record.

Plaintiffs' motions in this regard serve as another example of the wasteful, non-productive tactics Plaintiffs' counsel employed. Plaintiffs' complaint is that Mr. Terilli's affidavit, filed on July 3, 2007, includes confidential statements from the first mediation, one of which relates to Plaintiffs' counsel's alleged failure to advise his clients about damages and the law, stating: "[o]ne can only conclude this was not done in this case at this point, or alternatively that Plaintiffs' counsel wanted the litigation to continue given that the Plaintiffs demanded on average about $750,000.00 in the first mediation."[27] (Plaintiffs' Opposition, Ex. 2.) Defendants, on July 9, 2007, cured the mistake by filing a notice of striking the originally filed affidavit and submitting a new affidavit without reference to the mediation. (*See* DE 506, 507, 510.) Notwithstanding defense counsel's

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[27] After filing their response to Plaintiffs' application for fees [DE 503], Defendants filed a revised affidavit of Mr. Terilli [DE 505] attaching an omitted affidavit. Both affidavits included the pertinent statement regarding mediation.

quick action to correct this error, Plaintiffs' counsel Boreth sent defense counsel a letter on July 13, 2007 in reference to both the original and the revised Terilli Affidavit stating "in the event you do not withdraw the Defendants' Memorandum of Law In Opposition, the two Affidavits referred to herein *and consent to Plaintiffs' attorneys' fee request* [$481,887], we will be left with no alternative but to file the appropriate motion." (Defendants' Opposition to Sanctions, Ex. C (emphasis added))

The key to unlocking a court's inherent power to impose a sanction is a finding of bad faith. *See Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998) (citing *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir.1995). "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *See id.* (citing *Primus Automotive Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997)).

The record is totally devoid of evidence of bad faith on defense counsel's part in this regard. Defendants, upon realizing that the Terrili Affidavit improperly referred to figures presented at mediation, took expedient measures to cure the mistake. Indeed, when Boreth sent the letter to defense

counsel, the error had already been cured.[28] In short, the inclusion of the information was not an attempt to gain an advantage over the Plaintiffs, but rather an error which counsel cured. Moreover, Plaintiffs cannot be prejudiced by the release of such information, as there is considerable evidence in the record that Plaintiffs sought inordinately high damage awards throughout this litigation. Indeed, the majority of Defendants' opposition is dedicated to this fact, and Plaintiffs, until the filing of the Terrili Affidavit, did not, nor could they in good faith, object to such record evidence. Thus, Plaintiffs' motion for sanctions, both against defense counsel as well as Samuel Terilli, must be denied.

III. Conclusion

For the reasons set forth herein, it is hereby

ORDERED that

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[28] Not only does the motion lack evidentiary support, which someone of Boreth's level of experience should and could have easily realized, it causes concern as the manner in which Plaintiffs' counsel attempted to profit from defense counsel's error is tantamount to extortion. Boreth demanded that Defendants pay their attorneys' fees in total or else Plaintiffs would file these two sanctions motions. Such conduct is in direct conflict with the minimal standards expected of members of The Florida Bar and would be deserving of a sanction. However, the fee awarded in the this matter takes such conduct into consideration.

1. Plaintiffs' Motion for Attorneys' Fees [DE 486] is GRANTED IN PART AND DENIED IN PART.

2. Defendants' Motion for Sanctions Against Plaintiffs' Counsel [DE 487] is DENIED.

3. Plaintiffs' Motion for Sanctions Against Defense Counsel and Motion to Strike Defendants' Response to Plaintiffs' Motion for Attorneys' Fees [DE 512, 514] is DENIED.

4. Plaintiffs' Motion for Sanctions Against Non-party Samuel Terilli [DE 513] is DENIED.

5. Plaintiffs' Motion for Sanctions Against Defense Counsel [DE 532] is DENIED.

DONE AND ORDERED at Miami, Florida this 11th day of March, 2008.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc:
Counsel of Record
Robert Weisberg, Special Master

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11523-HH

GEORGE POWELL,
VILIAM KRALOVIC,
ANOUSHEH SARFARAZ,
MARK DONAHAY,
ERROL ROBINSON,
CARLOS BETANCOURT,
ALPHONSO MCINTYRE,
LUIS LOIZARO,
MIOMIR MAUSIMCEV,
ED MAZZEO,

Plaintiffs-Appellants
Cross-Appellees,

FRANCISCO RENGIFO,
OSCAR R. PEREZ,
JOHN JOSEPH HUMPHREYS,
WILHELM BRAGA PEREIRA,
JUAN C. ALBA,

Plaintiffs-Counter-
Defendants-Appellants
Cross-Appellees,

GLASSER, BORETH & KLEPPIN,

Interested-Party-
Appellant Cross-
Appellee,

versus

CAREY INTERNATIONAL, INC.,
a Delaware corporation qualified to
do business in the State of Florida,
CAREY LIMOUSINE FLORIDA, INC.,
a Delaware corporation qualified to
do business in Florida,

Defendants-Counter-
Claimants-Appellees
Cross-Appellants,

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Jun. 19, 2009)

Before: CARNES, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. R. Cox
UNITED STATES CIRCUIT JUDGE